No. 01-10868-CSY Title: Charles Kenneth Foster, Petitioner
v.
CAPITAL CASE Florida, et al.

Docketed: Court: Supreme Court of Florida
June 20, 2002

Entry	Date	Proceedings and Orders
	May 10 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 20, 2002)
	Jul 19 2002	Brief of respondent Florida in opposition filed.
	Aug 1 2002	DISTRIBUTED for Conference of September 30, 2002
	Oct 7 2002	REDISTRIBUTED for Conference of October 11, 2002
	Oct 15 2002	REDISTRIBUTED for Conference of October 18, 2002
	Oct 21 2002	Petition DENIED. Statement by Justice Stevens respecting the denial of the petition for a writ of certiorari. Opinion by Justice Thomas concurring in the denial of the petition for a writ of certiorari. Opinion by Justice Breyer dissenting from the denial of the petition for a writ of certiorari. (Detached opinion.)

****

01-10868

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IN THE

SUPREME COURT OF THE UNITED STATES

NO: _____

CHARLES KENNETH FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the
State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE
QUESTION I:

The Florida Supreme Court erred in upholding a trials court's denial of Defendant's 3.850 Motion for Post Conviction Relief without a hearing based upon his alleged violation of his right to an impartial jury.

The Trial Court and State Attorney systematically excluded pregnant women or women with small children from the venire without Petitioner's knowledge or consent. (Contrary to the V, VI and XIV Amendments to the United States Constitution and Article I, Section 9 and 16 to the Constitution of the State of Florida).

CAPITAL CASE
QUESTION II:

The Florida Supreme Court engaged in a constitutionally flawed harmless error analysis in the Defendant's previous Appeal. **Foster v. State**, 654 So.2d 112 (Fla. 1995). (Appendix A-2) (Contrary to the V and VI Amendments to the United States Constitution.)

CAPITAL CASE
QUESTION III:

The Florida Supreme Court erred in upholding the trial court's denial

of Defendant's 3.850 Motion for post-conviction relief. Claims D., Cruel and Unusual Punishment - 23 years (now 26 years) on Death Row. (Contrary to the V, VIII and XIV Amendment to the United States Constitution and Article I, Sections 9 and 17 to the Constitution of the State of Florida.)

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1. THE FLORIDA SUPREME COURT ERRED IN DENYING PETITIONER'S 3.850 MOTION FOR POST-CONVICTION RELIEF WITHOUT A HEARING BASED UPON HIS ALLEGED VIOLATION OF HIS RIGHT TO AN IMPARTIAL JURY (CONTRARY TO THE V, VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION)

2. THE FLORIDA SUPREME COURT ENGAGED IN A CONSTITUTIONALLY FLAWED HARMLESS ERROR ANALYSIS IN THE PETITIONER'S PREVIOUS APPEAL. **FOSTER V. STATE**, 654 So.2d 112 (Fla. 1995). (CONTRARY TO THE V AND VI AMENDMENTS TO THE UNITED STATES CONSTITUTION)

3. THE FLORIDA SUPREME COURT ERRED IN DENYING PETITIONER'S 3.850 MOTION FOR POST-CONVICTION RELIEF. CLAIMS D - CRUEL AND UNUSUAL PUNISHMENT- 23 YEARS ON DEATH ROW. (CONTRARY TO THE V, VIII AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION)

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The opinion of the Florida Supreme Court that gives rise to this Petition appears as **Charles Kenneth Foster vs. State**, 810 So.2d 910 (Fla. 2002). It is submitted in Appendix A-1. The decision was rendered February 14, 2002.

JURISDICTION

Petitioner, Charles Kenneth Foster, filed a direct appeal to the Florida Supreme Court from denial of his Motion for Post-Conviction Relief (Fla. Rule 3.850). That Court rejected the appeal by its decision of February 14, 2002. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within ninety (90) days of the rendition order by the Florida Supreme Court.

Jurisdiction of this Court is involved pursuant to Supreme Court Rule 10 (c):

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATUTES INVOLVED IN THIS CASE

Florida Statute 40.01(1) 1975 (Appendix 4):

> Grand and petit jurors shall be take from the male and female persons over the age of twenty-one years, who are citizens of this state and who have resided in this state for one year and in their respective counties for six months and who are fully qualified electors of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen years of age, upon their request, shall be exempted from grand and petit jury duty.

STATEMENT OF THE CASE

A summary of the facts at trial (appears in 369 So.2d 928 (Fla. 1979), (Appendix A-5) revealed the following:

Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met Petitioner and the victim, Julian Lanier at a bar. They knew Petitioner, but the victim was a stranger.

The girls, after a discussion, agreed to go to the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The Petitioner and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.

Petitioner suddenly began hitting the victim and accusing him of taking advantage of his sister. (Gail was not his sister). Petitioner then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so Petitioner took a knife and cut the victim's spine.

The girls and Petitioner then drove off in the Winnebago and found the victim's wallet underneath a mattress. The Petitioner and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.

The next morning, Anita Rogers went to the Sheriff's Department and reported what had happened. She had been committed to a mental institution when she was 13 years of age and was not charged with any offense in this case.

Petitioner was charged by an indictment with the offenses of first-degree murder and robbery.

The Petitioner testified at trial and during his description of the events of the evening, testified as follows:

> "I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. I was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him."

The jury returned verdicts finding Petitioner guilty of robbery, premeditated murder in the first degree, and felony murder. After the sentence hearing, the jury returned an advisory verdict unanimously recommending that Petitioner receive the death penalty.

Thereafter, Petitioner's case was subject to several post-conviction applications and both State and Federal appeals. (Appendix 1). The decision of **Foster v. State**, 614 So.2d 455 (Fla. 1992) (Appendix A-6)remanded the case to enter a new sentencing order.

On August 12, 1993, Petitioner was again sentenced to death, and the Florida Supreme Court affirmed the sentence on June 16, 1995 and Rehearing was denied June 19, 1995. See **Foster v. State,** 654 So.2d 112 (Fla. 1995). (Appendix A-2) ***Certiorari*** was denied by the United States Supreme Court on October 10, 1995. **Foster v. Florida**, 516 U.S. 920, 116 S.Ct. 314, 133 L.Ed.2d 217 (1995).

Petitioner was appointed registry counsel on September 9, 1998, and an investigator, Michael Glantz, was appointed on December 12, 1998.

An Amended 3.850 Motion for Post-Conviction Relief was filed September 7, 1999. The State responded July 7, 2000.

Petitioner conceded that his Amended 3.850 Ground D, (Excerpts Appendix A-7) Petitioner's confinement on Death Row for over 23 years constitutes cruel and unusual punishment and Ground E , Electric Chair - cruel and unusual punishment had been resolved against Petitioner since the filing of his 3.850 motion. Ground A, Constitutionally Flawed Harmless

Error was raised for Florida Supreme Court reconsideration for possible Federal review.

However, these issues were preserved for possible Federal review since they involve death issues as applied to a person with severe mental deficiencies (Defendant was diagnosed as having " . . . serious organic problems secondary to head trauma and poor prenatal care," and " . . . organic mental disorders."

Through public records disclosure of the prosecutor's files, Petitioner's investigator, appointed December 12, 1998, obtained a previously undisclosed document of the original venire in his case. The amended 3.850 motion alleged that this document contained prosecution notes of the venire pre-selection process in Bay County. The jury list revealed that women were systematically excluded if they were pregnant or had small children.

It was further alleged that neither Petitioner or his counsel was present at this pre-selection process, no record of the event was made, except the list located ". . .through public records disclosure by current counsel's investigator, Michael Glantz. " Thus, claim was made that there was no documentation of this issue except the State's venire notes. The Trial Court denied Petitioner an evidentiary hearing on this issue. (Appendix 3)

From the Order Denying Post-Conviction Relief, December 27, 2000, Petitioner filed timely Notice of Appeal to the Florida Supreme Court on January 22, 2001. That Court rendered its decision rejecting Petitioner's appeal and original ***habeas corpus*** petition in **Foster v. State**, 810 So.2d 910 (Fla. 2002). (Appendix A-1)

Pursuant to Supreme Court Rule 14 ***certiorari***, the questions sought to be reviewed were raised and passed on by the Courts below as follows:

> **Question I - Violating Right to Impartial Jury**. Raised in Petitioner's State Motion for Post Conviction Relief, (Appendix A-7) Ground 14B filed September 3, 1999, Page 12 - 15. Issue rejected in Trial Courts Order of December 29, 2000. (Appendix A-3) and rejected by the Florida Supreme Court on direct appeal. (Appendix A-1) Presented in Petitioner's Brief on Appeal. (Excerpts Appendix A-8 and Excerpts Appendix A-9)

Question II - Constitutionally Flawed Harmless Error Analysis. Raised in Petitioner's State 3.850 motion filed September 3, 1999. Ground 14A, Constitutionally Flawed Harmless Error Analysis. Page 10 - 12 of Amended Motion for Post-Conviction Relief. (Appendix A-7). Trial Court denied Question in its Order of December 29, 2000. (Appendix A-3), issue rejected by the Florida Supreme Court. (Appendix A-1) and (Excerpts Appendix A-9 presented in Petitioner's Brief on Appeal, Excerpts Appendix A-8)

Question III - Twenty-three (23) years on Death Row - Cruel and Unusual Punishment. Raised in Petitioner's Motion for Post-Conviction Relief Ground 14D, Page 16 - 17 (Appendix A-7), issue rejected in Trial Court's Order of December 29, 2000. (Excerpts Appendix A-3) and rejected by Florida Supreme Court on direct appeal. (Appendix A-1) and

(Excerpts Appendix A-9 presented in Petitioner's Brief on Appeal A-8)

REASONS FOR GRANTING WRIT

CAPITAL CASE
QUESTION I

THE FLORIDA SUPREME COURT ERRED IN DENYING PETITIONER'S 3.850 MOTION FOR POST-CONVICTION RELIEF WITHOUT A HEARING BASED UPON HIS ALLEGED VIOLATION OF HIS RIGHT TO AN IMPARTIAL JURY (CONTRARY TO THE V, VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION)

Failure of the Trial Court to permit an evidentiary hearing on this issue should have been considered reversible error. The amended 3.850 motion sufficiently alleged that the State's jury notes were not available until the public records review of the State's files by conflict counsel's investigator. Those notes revealed a systematic exclusion of pregnant women or women with young children.

The statute in effect at Petitioner Foster's trial was declared unconstitutional in **Alachua County Court Executive v. Anthony**, 418 So.2d 264 (Fla. 1982). In denying Petitioner's amended 3.850 motion, Trial Judge Sirmons concluded that the **Alachua** case addressed "equal protection" issues and therefore did not ". . .compromise the integrity of the jury." (Appendix A-3) **Alachua** very clearly declares the statute under which Petitioner's female jurors were excluded unconstitutional. Cases cited by the Trial Court or Supreme Court of Florida do not realistically address

the issue presented here. Women were excluded under an unconstitutional statute, and any gender exclusions of that degree violated constitutional equal protection standards to an "impartial jury" under the Sixth Amendment, United States Constitution. Alsc, the Trial Court's "equal protection distinction" does not find support in the United States Supreme Court. In **Batson v. Kentucky**, 106 S.Ct. 1712, 90 L.Ed.2d 69, 476 U.S. 79 (1986) the court held:

> By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in fairness of our system of justice. Pp. 1716-1718.
>
> The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury.

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 95 S. Ct. 692 (1975) struck **Louisiana's** jury pool law based upon its exclusion of women (except those who requested to serve).

The Supreme Court held:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth **698 Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as

a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge. **Duncan v. Louisiana**, 391 U.S., at 155-156, 88 S. Ct. at 1450-1451. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case... (T)he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly ***531** because sharing in the administration of the justice is a phase of civic responsibility. " **Thiel v. Southern Pacific Co.**, 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) Frankfurter, J., dissenting).

> Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

The Florida Supreme Court in **McArthur v. State**, 351 So.2d 972 (Fla. 1977) held that F.S. 40.01 (1) did not exclude a constitutionally significant class, in as much as no distinctive quality of parenthood or sex is lost by the exclusion.

Subsequently, however, the Florida Supreme Court in **Alachua County v. Anthony**, 418 So.2d 264 (Fla. 1982) declared F.S. 40.013(4)

unconstitutional based upon its gender-based classification. It is important to note the Court's language in striking down the statute.

> Although section 40.013(4) is not being challenged in this proceeding on Sixth Amendment grounds, we note that courts look with disfavor on broadly drawn automatic exemptions from jury service. In **Duren v. Missouri**, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), the United States Supreme Court declared unconstitutional an exemption available upon request to all women because of their important role in the home and family life. In **Lee v. Missouri**, 439 U.S. 461, 99 S.Ct. 710, 58 L.Ed.2d 736 (1979), the Court ordered that the **Duren** decision be retroactively applied to all juries sworn after the 1975 ruling in **Taylor v. Louisiana**, 419 U.S. 522, 95 S.Ct.692, 42 L.Ed 2d 690 (1975), which set out the basic constitutional guidelines for jury selection.
>
> Our affirmance of the First District Court of Appeal's decision holding this automatic exemption unconstitutional does not mean that individuals, male or female, with child-rearing responsibilities should not be granted an exemption from jury service under the discretionary provisions of section 40.013(6). We expect the trial judges of this state to recognize that one who has the responsibility of caring for small children has a legitimate ground for requesting and receiving an exemption under that section.

CAPITAL CASE
QUESTION II

THE FLORIDA SUPREME COURT ENGAGED IN A CONSTITUTIONALLY FLAWED HARMLESS ERROR ANALYSIS IN THE PETITIONER'S PREVIOUS APPEAL. FOSTER V. STATE, 654 SO.2D 112 (FLA. 1995). (CONTRARY TO THE V AND VI AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue included in Petitioner's 3.850 motion was more appropriately addressed in his Petition for ***habeas corpus*** proceeding filed below. If there was legally no evidence of a robbery or felony-murder, then the cold, calculated, premeditated aggravator was misapplied under the harmless error standard and the unconstitutionally applied cold, calculated, premeditated instruction considered harmless by the Florida Supreme Court.

If Petitioner's case had been submitted to a jury without the robbery aggravator and with an appropriate cold, calculated, premeditated instruction, the eight to four death recommendation would likely be favorably different. Likewise, the sentencing judge would be more apt to impose a life sentence without the robbery aggravator or unconstitutional instruction.

Harmless error analysis in a death case essentially means that either the trial judge or Florida Supreme Court engaged in a fact finding mission, ***ie*** their own version of facts (not necessarily those decided by the jury). Accordingly, a determination that based on the court's fact, the case warrants

death although the jury instruction was flawed. Compare **U.S. v. Gaudin**, 515 U.S. 506 (1995), 115 S.Ct. 2310, 132 L.Ed.2d 444 and **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348 (2000), 147 L.Ed. 435.

CAPITAL CASE
QUESTION III

THE FLORIDA SUPREME COURT ERRED IN DENYING PETITIONER'S 3.850 MOTION FOR POST-CONVICTION RELIEF. CLAIMS D. CRUEL AND UNUSUAL PUNISHMENT - 23 YEARS (NOW 26 YEARS) ON DEATH ROW (CONTRARY TO THE V, VIII AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION)

The Florida Supreme Court has previously ruled against this claim. The issues were submitted to the Florida Supreme Court for re-consideration and possible future United States Constitutional review.

In **Knight v. State**, 746 So.2d 423 (Fla. 1999) the Florida Supreme Court held:

> Finally, **Knight** claims that to execute him after he has already endured more than two decades on **death row** is unconstitutionally **cruel** and **unusual** punishment. He also argues that Florida has forfeited its right to execute **Knight** under binding norms of international law. Although, **Knight** makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted **Knight's** argument that a prolonged stay on **death row** constitutes **cruel** and **unusual** punishment, especially where both parties bear responsibility for the long delay. *See, e.g.*, **White v. Johnson**, 79 F.3d 432 (5th Cir.1996); **State v. Smith**, 280 Mont. 158, 931 P.2d 1272 (1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See* **State v. Schackart**, 190 Ariz. 238, 947 P.2d 315, 336 (1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), ***Cert. Denied***, 525 U.S. 862, 119 S.Ct. 149 L.Ed.2d 122 (1998). Second, we also consider that irrespective of the status of this case, **Knight** has been and will remain incarcerated on death row for his 1980 murder of Officer Burke until that case is finalized. We similarly reject **Knight's** claim under international law.

Unlike **Knight,** however, Petitioner Foster's post-conviction relief was largely successful in obtaining new sentence proceedings due to trial court errors.

Justices Brennan and Marshall in **Glass v. Louisiana**, 105 S.Ct. 2159, 85 L.Ed.2d 514, 471 U.S. 1080 (1985) in their dissent from denial of ***certiorari*** observed the following:

> "I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, **Gregg v. Georgia,** 428 U.S. 153, 227, 96 S.Ct. 2909, 2950, 49 L.Ed.2d 859 (1976) (BRENNAN, J., dissenting), and would therefore grant ***certiorari*** and vacate Glass' death sentence in any event. One of the reasons I adhere to this view is my belief that the "physical and mental suffering" inherent in ***any*** method of execution is so "uniquely degrading to human dignity" that, when combined with the arbitrariness by which capital punishment is imposed, the trend of enlightened opinion, and the availability of less severe penological alternatives, the death penalty is always unconstitutional. **Furman v. Georgia,** 408 U.S. 238, 287-291, 92 S.Ct. 2726, 2751-2753, 33 L.Ed.2d 346 (1972).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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IN THE
SUPREME COURT OF THE UNITED STATES
NO: _____

CHARLES KENNETH FOSTER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Petition for Writ of Certiorari and Appendix have been served by U.S. Mail upon MICHAEL MOORE, SECRETARY, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500; the Office of the Attorney General, Attention: RICHARD MARTELL, ASST ATTORNEY GENERAL, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050; and The Office of the State Attorney, Bay County, Attention: ALTON PAULK, ASA, P O Box 1040, Panama City, FL 34202 this the 8th day of May, 2002.

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EDITOR'S NOTE

ORIGINAL PAGINATION IS NOT CONTINUOUS

IN THE (3)

SUPREME COURT OF THE UNITED STATES

NO: 01-10868

CHARLES KENNETH FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX
TO
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Supreme Court of Florida.

Charles Kenneth **FOSTER**, Appellant,
v.
STATE of Florida, Appellee.
Charles Kenneth **Foster**, Petitioner,
v.
Michael W. Moore, etc., et al., Respondents.

Nos. SC01-240, SC01-767.

Feb. 14, 2002.

Defendant's murder conviction and death sentence were affirmed on appeal, 369 So.2d 928, and re-imposition of death sentence was affirmed, 654 So.2d 112, following vacation of sentence on defendant's third postconviction motion. Defendant filed fourth postconviction motion, which the Circuit Court, Bay County, summarily denied, and defendant appealed and filed petition for habeas corpus. The Supreme Court held that: (1) defendant's claim regarding voir dire was procedurally barred; (2) State did not withhold exculpatory evidence from defendant in violation of *Brady*; (3) defendant could not bring postconviction claim that the Supreme Court engaged in a constitutionally flawed harmless error analysis on earlier appeal; and (4) appellate counsel did not have to argue in more detail that trial court erred when it found that state had proven aggravator.

Affirmed.

West Headnotes

[1] Criminal Law ⇐1144.17
110k1144.17

[1] Criminal Law ⇐1652
110k1652

To uphold the trial court's summary denial of claims raised in a postconviction relief motion, the claims must be either facially invalid or conclusively refuted by the record, and where no evidentiary hearing is held below, appellate court must accept the defendant's factual allegations to the extent they are not refuted by the record. West's F.S.A. RCrP Rule 3.850.

[2] Criminal Law ⇐1652
110k1652

A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. West's F.S.A. RCrP Rule 3.850.

[3] Criminal Law ⇐1655(6)
110k1655(6)

A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing; rather, the defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant. West's F.S.A. RCrP Rule 3.850.

[4] Criminal Law ⇐1429(1)
110k1429(1)

Defendant's postconviction claim that expectant mothers and mothers with young children were improperly excused automatically rather than upon request was procedurally barred, as defendant's challenge to procedure in which jurors were excused was not properly preserved at the trial level. F.S.1975, § 40.01(1).

[5] Criminal Law ⇐1536
110k1536

Postconviction claim challenging procedure in which expectant mothers and mothers with young children were excused could not be brought as a newly discovered evidence claim, as defendant admitted he knew at time of trial that judge conducted a voir dire outside his and counsel's presence, and his counsel could have attempted to discover what went on at that meeting through due diligence, and filed a timely pretrial motion.

[6] Criminal Law ⇐1536
110k1536

The initial prong for determining whether something constitutes "newly discovered evidence" for purposes of a postconviction claim involves the fact that it must have been unknown by the trial court, by the party, or

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by counsel at the time of trial and the defendant, or his counsel could not known of it through due diligence.

[7] Criminal Law ⇐1580(10)
110k1580(10)

Defendant's postconviction claim that counsel was ineffective for failing to discover and litigate exclusion of pregnant women and women with small children during voir dire failed to allege specific facts that demonstrated a deficiency on part of counsel that resulted in prejudice to defendant, where defendant devoted only one sentence to claim, stating that "To the extent trial counsel failed to discover and litigate this issue, Defendant was denied effective assistance of counsel."

[8] Criminal Law ⇐700(5)
110k700(5)

State did not withhold exculpatory evidence from defendant in violation of *Brady*, based on a failure to disclose until a public records request a letter from jail physician in which physician observed "obvious mental disturbance" in defendant during an examination before trial, as defense counsel was in possession of this letter during penalty phase of defendant's resentencing hearing.

[9] Criminal Law ⇐700(2.1)
110k700(2.1)

There are three components that a defendant must show in order to be successful in a *Brady* claim: (1) the evidence must be favorable to the defendant because it is either exculpatory or because it is impeaching, (2) the evidence must have been withheld by the state, either willfully or inadvertently, and (3) prejudice to the defendant must have ensued.

[10] Criminal Law ⇐29(14)
110k29(14)

Jury could return two murder verdicts, finding defendant guilty of separate counts of premeditated murder and felony murder for a single death.

[11] Double Jeopardy ⇐150(2)
135Hk150(2)

Trial court's adjudication of guilt on a single murder conviction for first- degree murder conclusively refuted defendant's double jeopardy claim, based on jury's return of two murder verdicts, finding him guilty of separate counts of premeditated murder and felony murder for a single death.

[12] Sentencing and Punishment ⇐1795
350Hk1795

Defendant's 23 years spent on death row did not constitute cruel and unusual punishment.

[13] Sentencing and Punishment ⇐1612
350Hk1612

Death penalty is not per se cruel and unusual punishment.

[14] Criminal Law ⇐1552
110k1552

Postconviction motion was not the proper vehicle for defendant to claim that the Supreme Court engaged in a constitutionally flawed harmless error analysis regarding the giving of-an erroneous cold, calculated, and premeditated aggravator instruction. West's F.S.A. RCrP Rule 3.850.

[15] Criminal Law ⇐1426(3)
110k1426(3)

Postconviction motions are a vehicle provided to challenge collateral issues related to the trial court proceedings, not appellate decisions. West's F.S.A. RCrP Rule 3.850.

[16] Criminal Law ⇐1433(2)
110k1433(2)

Defendant's postconviction claim that the Supreme Court engaged in a constitutionally flawed harmless error analysis regarding the giving of an erroneous cold, calculated, and premeditated aggravator instruction was procedurally barred because it was an improper relitigation of an issue upon which the Supreme Court has already ruled.

[17] Habeas Corpus ⇐486(1)
197k486(1)

Issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus.

[18] Habeas Corpus ⇐486(5)

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197k486(5)

Ineffective assistance of postconviction counsel is not a cognizable claim in a petition for habeas corpus.

[19] Criminal Law ⇐641.13(7)
110k641.13(7)

Appellate counsel did not have to argue in more detail that trial court erred when it found that state had proven aggravator that murder was committed while defendant was engaged in commission of a robbery, where eyewitness to murder who was with defendant immediately before testified that defendant said he was going to "rip the old man off" by taking his money, which rebutted defendant's argument that taking wallet was an afterthought and provided an evidentiary basis for robbery conviction, such that appellate counsel's failure to argue robbery aggravator in more detail was not ineffective assistance.

Joseph F. McDermott, St. Pete Beach, FL, for Appellant/Petitioner.

Robert A. Butterworth, Attorney General, and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, FL, for Appellee/Respondent.

PER CURIAM.

*1 Charles Kenneth Foster, a prisoner under the sentence of death, appeals an order entered by the trial court denying his postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850. Foster also petitions this Court for writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. These cases have been consolidated. We affirm the trial court's denial of postconviction relief, and we deny habeas relief.

PROCEEDINGS TO DATE

The prior proceedings in this case have been extensive, both in the trial court and on appeal. The facts are set out in detail in *Foster v. State*, 369 So.2d 928 (Fla.1979). Foster was convicted of the first-degree murder and robbery of Julian Lanier, and, after the jury recommended death, the trial court sentenced him to death. *See id.* at 931. Foster's conviction and sentence were affirmed by this Court. *See id.* at 932.

This Court subsequently affirmed the trial court's denial of Foster's first postconviction motion, *see Foster v. State*, 400 So.2d 1 (Fla.1981), and also affirmed the trial court's denial of Foster's second postconviction motion. *See Foster v. State*, 518 So.2d 901 (Fla.1987). However, this Court granted Foster's habeas petition and remanded for a new sentencing proceeding based on a *Hitchcock* [FN1] error. *See id.* at 902. Foster's resentencing jury recommended death by an eight-to-four vote and the trial court imposed a death sentence. *See Foster v. State*, 614 So.2d 455, 458 (Fla.1992). In addition, pending resentencing, Foster filed a third postconviction motion, which the trial court summarily denied. *See id.* Upon review of the denial of postconviction relief and of resentencing, this Court affirmed the denial of Foster's third postconviction motion, but vacated Foster's death sentence and remanded the case for the trial court to enter a new sentencing order consistent with *Rogers v. State*, 511 So.2d 526 (Fla.1987), and *Campbell v. State*, 571 So.2d 415 (Fla.1990). *See Foster*, 614 So.2d at 465.

Pursuant to our remand, the trial court entered a new sentencing order, reimposing the death sentence, and this Court subsequently affirmed the sentence. *See Foster v. State*, 654 So.2d 112, 113 (Fla.1995). The trial court found three statutory aggravators: (1) the murder was committed while Foster was engaged in the commission of or attempt to commit robbery; (2) the crime was especially heinous, atrocious, or cruel; and (3) the murder was committed in a cold, calculated, and premeditated manner (CCP). *See id.* at 113-14. The trial court found fourteen nonstatutory mitigators: (1) Foster murdered Lanier while he was under the influence of emotional or mental disturbance (little weight); (2) Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired (little weight); (3) Foster has an abusive family background (very little weight); (4) Foster's poverty (very little weight); (5) Foster's physical illnesses (very little weight); (6) Foster's love for, and love by, his family (very little weight); (7) Foster's alcohol and/or drug addiction (very little weight); (8) Foster's troubled personal life (very little weight); (9) Foster's physical injuries (very little weight); (10) Foster's lack of childhood development (very little weight); (11) Foster's struggle with the death of loved ones (very little weight); (12) Foster's learning disabilities; (13) Foster's potential for positive sustained human relationships (very little weight); and (14) Foster's remorse for the crime (very little weight). *See id.* at 113 n. 5.

THIS APPEAL AND PROCEEDING

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*2 On September 7, 1999, Foster filed his fourth 3.850 motion, which represents the first 3.850 motion filed after the trial court entered a new sentencing order pursuant to our remand citing *Campbell*. [FN2] A *Huff* [FN3] preliminary hearing on this motion was held on November 27, 2000. On December 29, 2000, the trial court summarily denied the motion on all grounds. [FN4] Foster now appeals the trial court's summary denial of his fourth 3.850 motion, alleging that the trial court erred in denying him an evidentiary hearing, and he petitions this Court separately for a writ of habeas corpus.

3.850 APPEAL

Foster's claims on appeal from the summary denial of his 3.850 motion may be summarized as: (1) the trial court erred by denying without a hearing Foster's claim that his right to an impartial jury was violated; (2) the trial court erred by denying without a hearing Foster's claim that his conviction violated double jeopardy; (3) the trial court erred by denying without a hearing Foster's *Brady* claim; (4) the trial court erred by denying without a hearing Foster's claim that the twenty-three years that Foster has spent on death row constitute cruel and unusual punishment; and (5) the Florida Supreme Court engaged in a constitutionally flawed harmless error analysis in *Foster v. State*, 654 So.2d 112 (Fla.1995).

[1][2][3] This Court has summarized the standard of review for summary denial of a 3.850 claim:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.

Peede v. State, 748 So.2d 253, 257 (Fla.1999) (citations omitted). However, this Court has also held the following:

> A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.

Kennedy v. State, 547 So.2d 912, 913 (Fla.1989) (citations omitted).

We affirm the trial court's summary denial of Foster's 3.850 claims, as they each fall into one of three categories: procedurally barred, without merit, or conclusively refuted by the record.

RIGHT TO AN IMPARTIAL JURY

[4] Foster claims the trial court erred by summarily denying the claim that his right to have an impartial jury was violated because a fair cross-section of the community was not available to serve on his jury due to the trial judge excusing a certain class of prospective jurors. Specifically, Foster alleges for the first time in this 3.850 motion that pregnant women and women with small children were automatically excused from the jury venire before voir dire began, pursuant to a flawed statutory exemption scheme. Foster bases this allegation on the fact that the State's jury notes, which allegedly were not previously available to him, do not affirmatively indicate that potential jurors were not excused. Foster states that if the trial court automatically excused this class of people, it did so improperly because the statute provided, "[E]xpectant mothers and mothers with children under 15 years of age, *upon their request*, shall be exempted from grand and petit jury duty." § 40.01(1), Fla. Stat. (1975) (emphasis added). Foster claims that he was entitled to an evidentiary hearing to explore whether or not jurors were improperly excused.

*3 [5][6] We find this claim is procedurally barred because Foster's challenge to the procedure in which jurors were excused was not properly preserved at the trial level. [FN5] *See Hoskins v. State*, 702 So.2d 202 (Fla.1997) (holding that the defendant's challenge to the trial court's practice of having the court clerk automatically excuse prospective jurors pursuant to section 40.013(5), Florida Statutes (1995), was not timely filed because the excusals had already been made and the defendant did not challenge his jury panel). We therefore affirm the trial court's summary denial of this claim.

[7] Foster also advances an ineffective assistance of counsel argument on this claim. In his 3.850 motion, Foster contends that counsel was ineffective for failing to discover and litigate the exclusion of pregnant women and women with small children during voir dire.

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In his 3.850 motion, Foster devoted only one sentence to the ineffective assistance of counsel claim, stating: "To the extent trial counsel failed to discover and litigate this issue, Defendant was denied effective assistance of counsel." Foster has simply failed to allege specific facts that, when considering the totality of the circumstances, demonstrate a deficiency on the part of counsel which resulted in prejudice to the defendant. Furthermore, Foster has not demonstrated that he was constitutionally entitled to have pregnant women and women with small children serve on his jury since section 40.01(1), Florida Statutes (1975), provided them with an excuse for service and this Court has upheld the statute in the face of constitutional concerns. *See McArthur v. State*, 351 So.2d 972, 975 (Fla.1977). Therefore, we find the trial court did not err by denying Foster an evidentiary hearing on this claim.

BRADY CLAIM

[8][9] Foster alleges the trial court erred by not holding a hearing on his claim that the State withheld exculpatory evidence from him in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). [FN6] Specifically, Foster alleges the State did not disclose (until a public records request), a letter from jail physician Dr. Russell Stewart to Sheriff Tullis Easterling dated July 31, 1975, in which Dr. Stewart observed "obvious mental disturbance" in Foster during an examination before trial. However, the record affirmatively and conclusively refutes Foster's claim that the letter was withheld by the State, either willfully or inadvertently, because the record reflects that defense counsel was in possession of this letter on June 6, 1990, during Foster's resentencing hearing. Defense counsel moved to have the letter entered into evidence and the court admitted it as defense exhibit number 4 during the penalty phase of Foster's resentencing hearing. We therefore affirm the trial court's summary denial of this claim because Foster's *Brady* claim is conclusively refuted by the record.

DOUBLE JEOPARDY VIOLATION

[10][11] Foster alleges the trial court erred by summarily denying his claim that the jury's two murder verdicts, finding him guilty of separate counts of premeditated murder and felony murder for a single death, violate double jeopardy principles. We find the jury's dual verdict is supported by the evidence in this case, and, as we stated in *Lamb v. State*, 532 So.2d 1051, 1052 (Fla.1988), "there is no reason why a defendant cannot premeditate a murder committed during the course of a felony." We hereby affirm the trial court's summary denial of this claim because the record reflects that the trial court properly adjudicated Foster guilty of a single murder conviction for first-degree murder, which conclusively refutes Foster's double jeopardy claim. *See id.* Of course, Foster also received a single sentence for the murder.

CRUEL AND UNUSUAL PUNISHMENT

*4 [12][13] Foster argues the trial court erred when it summarily denied his claim that the twenty-three years he has spent on death row constitutes cruel and unusual punishment. We have previously held an extended stay on death row does not constitute cruel and unusual punishment. *See Knight v. State*, 746 So.2d 423, 437 (Fla.1998). We also reject Foster's claim that the death penalty is per se cruel and unusual punishment, an issue that we have already decided adversely to him. *See Davis v. State*, 742 So.2d 233, 235-36 (Fla.1999) (holding that the claim that the death penalty is basically cruel and unusual punishment is without merit). Therefore, we affirm the trial court's summary denial of this claim, as we find that it is without merit.

HARMLESS ERROR ANALYSIS

[14][15][16] Foster alleges this Court engaged in a constitutionally flawed harmless error analysis regarding our conclusion in *Foster v. State*, 654 So.2d 112, 115 (Fla.1995), in which we stated that because the trial court found no statutory mitigators and three strong aggravators, the giving of an erroneous cold, calculated, and premeditated aggravator instruction did not affect the jury's consideration of his sentence, and therefore the giving of such instruction was harmless error. A postconviction motion is not the proper vehicle to challenge a decision of this Court. Rule 3.850 motions are a vehicle provided to challenge collateral issues related to the *trial court* proceedings, not appellate decisions. *See* Fla. R.Crim. P. 3.850(a)(1)-(6). Further, this claim is procedurally barred because it is an improper relitigation of an issue upon which this Court has already ruled. *See Brown v. State*, 596 So.2d 1026, 1028 (Fla.1992). We therefore affirm the trial court's summary denial of this claim.

HABEAS CORPUS

[17][18] Foster alleges both appellate counsel and

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postconviction counsel were ineffective for not sufficiently arguing that the trial court erred when it stated that aggravators were established beyond a reasonable doubt, without a specific factual analysis that a robbery was committed. The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus and we consider it here. *See Freeman v. State*, 761 So.2d 1055, 1069 (Fla.2000). However, this Court has held that ineffective assistance of postconviction counsel is not a cognizable claim. *See Waterhouse v. State*, 792 So.2d 1176, 1193 (Fla.2001) (citing *State ex rel. Butterworth v. Kenny*, 714 So.2d 404, 408 (Fla.1998), and *Lambrix v. State*, 698 So.2d 247, 248 (Fla.1996)).

[19] Foster takes issue with his appellate counsel for not sufficiently arguing that the trial court erred when it found that the State had proven the aggravator that the murder was committed while Foster was engaged in the commission of a robbery. The record reflects that the robbery aggravator was asserted during the penalty phase, but only after evidence of a robbery had already been presented during the guilt phase and the jury found Foster guilty of the robbery that arose out of the same criminal episode as the murder. This Court has stated, "[A]ppellate counsel cannot be deemed ineffective for failing to raise non-meritorious claims on appeal, or claims that do not amount to fundamental error." *Happ v. Moore*, 784 So.2d 1091, 1095 (Fla.2001) (citation omitted). We find that appellate counsel was not deficient for failing to raise this issue in more depth because the argument had no merit.

*5 Foster argues that his direction to another person to take a wallet from a dead body is merely evidence of an "afterthought," not evidence of robbery. This Court has stated:

> Where an "afterthought" argument is raised, the defendant's theory is carefully analyzed in light of the entire circumstances of the incident. If there is competent, substantial evidence to uphold the robbery conviction, and no other motive for the murder appears from the record, the robbery conviction will be upheld. Conversely, in those cases where the record discloses that, in committing the murder, the defendant was apparently motivated by some reason other than a desire to obtain the stolen valuable, a conviction for robbery (or the robbery aggravator) will not be upheld.

Beasley v. State, 774 So.2d 649, 662 (Fla.2000) (citations omitted) (holding that property being stolen after the victim was killed constituted a robbery because no evidence demonstrated any motive for killing the victim other than to take her money). *See also Jones v. State*, 652 So.2d 346 (Fla.1995); *Bruno v. State*, 574 So.2d 76 (Fla.1991). The record reflects that Anita Rogers, an eyewitness to the murder who was with Foster immediately before the murder, testified that Foster said he was going to "rip the old man off" by taking his money when the man went to bed with Gail Evans. This testimony rebuts Foster's "afterthought" argument and provides an evidentiary basis for Foster's robbery conviction. Therefore, because Foster has not shown that appellate counsel's failure to argue the robbery aggravator in more detail was of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and that this alleged deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result, the petition for writ of habeas corpus is denied.

Based on the foregoing, we affirm the trial court's denial of 3.850 relief and deny habeas corpus relief.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS, and QUINCE, JJ., concur.

FN1. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (holding that it was error for the trial court to refuse to consider nonstatutory mitigating circumstances that were presented).

FN2. The claims in Foster's amended 3.850 motion were: (A) the Florida Supreme Court applied constitutionally flawed harmless error analysis regarding the CCP aggravator; (B) Foster was denied the right to an impartial jury; (C) Foster's guilty verdict including both felony murder and premeditated murder amounted to double jeopardy and due process violations; (D) Foster's confinement on death row for twenty-three years constitutes cruel and unusual punishment; (E) the death penalty constitutes cruel and unusual punishment; and (F) a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), was committed when the State did not disclose to the defense a jail physician's letter.

FN3. *Huff v. State*, 622 So.2d 982 (Fla.1993).

FN4. In addition to addressing the six main claims, the trial court briefly addressed twenty-nine claims that Foster included in his motion. Foster presented the claims as being previously preserved and often devoted little more than one sentence to each claim. The trial court stated, "[I]t is unclear if the Defendant is employing this method to incorporate those arguments or if he is merely outlining what was raised previously." In each of the twenty-nine claims, the trial court found that Foster failed to state a facially sufficient claim. Foster does not raise the issue of the trial court's ruling on any of those twenty-nine claims on appeal.

FN5. Foster's argument that this claim may be brought as a newly discovered evidence claim is refuted by the fact that in his own 3.850 motion, he admits he knew that the judge conducted a voir dire outside his and counsel's presence. The initial prong for determining whether something constitutes "newly discovered evidence," involves the fact that it must have been unknown by the trial court, by the party, or by counsel at the time of trial and the defendant, or his counsel could not known of it through due diligence. *See Jones v. State*, 709 So.2d 512, 521 (Fla.1998). Foster knew of the ex parte meeting with the jury venire at the time of his trial; his counsel could have attempted to discover what went on at that meeting through due diligence, and filed a timely pretrial motion. Thus, this allegation is not properly raised as one pursuant to newly discovered evidence.

FN6. We have held there are three components that a defendant must show in order to be successful in a *Brady* claim: (1) the evidence must be favorable to the defendant because it is either exculpatory or because it is impeaching; (2) the evidence must have been withheld by the State, either willfully or inadvertently; and (3) prejudice to the defendant must have ensued. *See State v. Riechmann*, 777 So.2d 342, 362 (Fla.2000).

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Supreme Court of Florida.

Charles Kenneth FOSTER, Appellant,
v.
STATE of Florida, Appellee.

No. 82335.

Feb. 23, 1995.
Rehearing Denied May 11, 1995.

On remand from the Supreme Court, 614 So.2d 455, for resentencing on homicide conviction, the Circuit Court, Bay County, Don T. Sirmons, J., again imposed sentence of death, and defendant appealed. The Supreme Court held that: (1) instruction that it was aggravating factor that homicide was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification was improper, but (2) error was harmless as the murder could only have been cold, calculated, and premeditated.

Affirmed.

West Headnotes

[1] Sentencing and Punishment ⇐1686
350Hk1686
(Formerly 203k356)

Sentence of death imposed on defendant who beat victim, stabbed him in the neck, dragged him into the woods, and cut his spinal cord was proportionate.

[2] Sentencing and Punishment ⇐1653
350Hk1653
(Formerly 110k1208.1(6))

[2] Sentencing and Punishment ⇐1658
350Hk1658
(Formerly 110k1208.1(6))

It is within purview of trial court to determine whether particular mitigating circumstance was proven and the weight to be given to it.

[3] Homicide ⇐311
203k311

[3] Homicide ⇐340(1)
203k340(1)

Instruction that it was aggravating factor that homicide was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification was improper, and was not cured by further instruction that fact that defendant was convicted of premeditated murder was not sufficient to require finding that murder was cold, calculated, and premeditated error.

[4] Homicide ⇐340(1)
203k340(1)

Constitutional error in instruction on aggravating factor that homicide was committed in cold, calculated, and premeditated manner was harmless, as the murder could only have been cold, calculated, and premeditated in view of evidence that defendant beat victim, stabbed him in the neck, dragged him into the woods, and cut his spinal cord.

*112 Richard H. Burr, NAACP Legal Defense and Educational Fund, Inc., New York City, and Steven L. Seliger, Quincy, for appellant.

Robert A. Butterworth, Atty. Gen., and Mark C. Menser and Curtis M. French, Asst. Attys. Gen., Tallahassee, for appellee.

*113 PER CURIAM.

Charles Kenneth Foster appeals his sentence of death following the trial court's issuance of a new sentencing order in accordance with this Court's directive in *Foster v. State*, 614 So.2d 455, 465 (Fla.1992). We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

Charles Foster was convicted of Julian Lanier's murder and sentenced to death in 1975. Foster's conviction and sentence were affirmed by this Court on direct appeal in *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). The trial court denied Foster's first postconviction motion, and this Court affirmed. *Foster v. State*, 400 So.2d 1 (Fla.1981). This Court also affirmed the trial court's denial of Foster's second postconviction motion. *Foster v. State*, 518 So.2d 901 (Fla.1987), *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 945 (1988). [FN1] However, this Court granted Foster's habeas petition and remanded for a new sentencing proceeding based on a *Hitchcock* error. [FN2] *Id.*

FN1. In addition, the Eleventh Circuit affirmed the denial of Foster's two federal habeas petitions. *Foster v. Dugger*, 823 F.2d 402 (11th Cir.1987), *cert. denied*, 487 U.S. 1241, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988); *Foster v. Strickland*, 707 F.2d 1339 (11th Cir.1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984).

FN2. *Hitchcock v. Dugger*, 481 U.S. 393, 398-99, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987) (concluding that an advisory jury must be instructed to consider, and a sentencing judge must consider, nonstatutory as well as statutory mitigating circumstances).

The resentencing jury recommended death by an eight-to-four vote and the trial court followed that recommendation. On remand for resentencing, Foster filed a third postconviction motion which the trial court summarily denied. This Court affirmed the denial of Foster's third postconviction motion. *Foster v. State*, 614 So.2d 455 (Fla.1992), *cert. denied*, 510 U.S. 951, 114 S.Ct. 398, 126 L.Ed.2d 346 (1993). However, on direct appeal of resentencing, this Court vacated Foster's death sentence and remanded the case for the trial court to enter a new sentencing order consistent with *Rogers* [FN3] and *Campbell*. [FN4] *Id.* at 465.

FN3. *Rogers v. State*, 511 So.2d 526, 534 (Fla.1987) (discussing the manner in which a trial court should consider mitigating circumstances in a case in which the State seeks the death penalty), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

FN4. *Campbell v. State*, 571 So.2d 415, 419 (Fla.1990) (recognizing that "the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature").

A new order was entered which reimposed the sentence of death. The trial court found fourteen nonstatutory mitigators to which it afforded little weight, [FN5] and three aggravators which it described as follows:

FN5. 1) Foster murdered Lanier while he was under the influence of emotional or mental disturbance--not *extreme* emotional or mental disturbance; 2) Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired--not *substantially* impaired; 3) Foster has an abusive family background; 4) Foster's poverty; 5) Foster's physical illnesses; 6) Foster's love for, and love by, his family; 7) Foster's alcohol and/or drug addiction; 8) Foster's troubled personal life; 9) Foster's physical injuries; 10) Foster's lack of childhood development; 11) Foster's struggle with the death of loved ones; 12) Foster's learning disabilities; 13) Foster's potential for positive sustained human relationships; and 14) Foster's remorse for the crime.

1. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or attempt to commit, the crime of robbery.
2. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. The circumstances of this killing indicate a consciousless [sic] and pitiless regard for the victim's life and was unnecessarily tortuous [sic] to the victim, Julian Franklin Lanier. The victim did not die an instantaneous type of death. The victim was severely beaten prior to death. His nose was fractured, his face was severely bruised and his eyes were swollen shut from edema from hemorrhage and swelling resulting from the beating. After beating the victim, the defendant took out a knife and told the victim "I'm going to kill you; I'm going to kill you." *114 There is evidence that one of the girls present asked the defendant not to do it. The defendant then proceeded to stab the victim in the throat. There is evidence of a defensive wound to the victim's hand which indicates the victim attempted to fend off the knife as the defendant stabbed him in the throat.
After stabbing the victim in the throat, the defendant grabbed the victim by his testicles, or genitals, in order to move the victim outside. The victim groaned or moaned and the defendant stabbed the victim in the throat a second time. This second wound cut the victim's internal and external jugular veins. The victim could have lived from 20 to 30 minutes after this wound was inflicted.
Neither of these wounds to the neck severed the victim's vocal cords. There is evidence that the victim asked the defendant not to do it again before he was stabbed the second time.

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After the second stab wound, the victim was dragged into the woods where he was covered with bushes. The marks on the victim's body indicated to the medical examiner, that the victim was either alive or dead a very short time before he was being dragged. It is consistent with what happened next to assume the victim was alive.

After the victim was covered in the woods, one of the girls accompanying the defendant reported to the defendant she could hear the victim breathing. The defendant then went back to the victim, who was lying face down, uncovered him and cut the victim's spine with a knife. As described by one witness, there was no air coming from the body of the victim after she heard "the cracking" of the spine. The medical examiner indicated the victim could have lived 3 to 5 minutes after his spinal cord was severed.

3. The capital felony for which the defendant is to be sentenced was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of any moral or legal justification. In addition to the facts set forth in paragraph 2 above, the defendant, prior to beginning to beat the victim, had switched his personal ring with a "K" on it with one of the girls' rings in order not to leave the "K" impression on the victim's skin. One of the girls testified that the defendant had told her he planned to rob the victim before the beating began. Finally, when the defendant was testifying in the original trial he made the following statement:

"I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, *I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language.* I am the one that done it. They didn't have a damn thing to do with it. *It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money* and I know I never told you about it but I killed him. (emphasis supplied) ["]

The facts of this case, together with the defendant's in court statement, are sufficient to establish the heightened degree of premeditation required for this aggravating factor to apply.

Foster raises three claims in this appeal: 1) the death penalty is not proportionately warranted in this case; 2) the trial court erred in concluding that a conflict existed regarding expert opinion relating to the mental health mitigators; and 3) the trial court's cold, calculated, and premeditated (CCP) aggravator instruction was constitutionally impaired and the giving of that instruction cannot be deemed harmless error.

[1][2] Having compared this case to other decisions of this Court, we conclude that death is proportionate here and therefore reject Foster's first claim. As to Foster's second claim, we simply note that this Court has repeatedly recognized that it is within the purview of the trial court to determine whether a particular mitigating circumstance was proven and the weight to be given it. *See, e.g., Daugherty v. State*, 419 So.2d 1067, 1070 (Fla.1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). We find that the trial court's conclusions regarding the mental health mitigators are supported by the record and therefore reject Foster's second claim. While we also reject ***115** Foster's third claim, it does warrant discussion.

At resentencing, the trial court gave the following CCP aggravator instruction:

> [T]he crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> I further instruct you that the defendant's conviction for first degree, premeditated murder is insufficient in and of itself to require a finding that the homicide was cold, calculated and premeditated for the purposes of this aggravating circumstance.

The trial court denied defense counsel's request for a more expansive instruction on the CCP aggravator.

[3] The first half of the instruction given in this case mirrors the standard CCP instruction which this Court held to be invalid in *Jackson v. State*, 648 So.2d 85 (Fla.1994). [FN6] The second paragraph of the instruction given in this case was a step in the right direction, but did not cure the constitutional infirmity which this Court identified in *Jackson*. Stated otherwise, the CCP instruction given in this case does not adequately explain the difference between the premeditation required to convict for first- degree murder and the heightened premeditation required to find the CCP aggravator.

FN6. Because Foster's sentence is not yet final, *Jackson* is controlling.

[4] Having concluded that the CCP instruction given in this case was constitutionally impaired, we must determine whether the giving of that instruction was harmless error. *Jackson* explains that in order for the giving of an erroneous CCP instruction to be harmless, the State must establish "beyond a reasonable doubt

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that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." *Jackson*, 648 So.2d at 90.

This Court previously concluded that there is competent, substantial evidence in the record to support the trial court's finding that Lanier's murder was cold, calculated, and premeditated. *Foster*, 614 So.2d at 461. We have again reviewed the record, including "new evidence" presented at resentencing, and we remain convinced that Lanier's murder could only have been cold, calculated, and premeditated. We find it particularly telling that after having concealed Lanier's body with bushes, Foster then proceeded to cut Lanier's spine with a knife when he realized that Lanier was still breathing. The fact that Foster had ample time to reflect on his actions and their attendant consequences, after concealing Lanier's body and before cutting Lanier's spine, is compelling evidence of the heightened level of premeditation required to establish the cold, calculated, and premeditated aggravator. *See, e.g., Swafford v. State*, 533 So.2d 270, 277 (Fla.1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989); *Jackson v. State*, 522 So.2d 802 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988). In view of the fact that the trial court found no statutory mitigators and three strong aggravators, we also find, beyond a reasonable doubt, that the invalid CCP instruction did not affect the jury's consideration and that its recommendation would have been the same if the requested expanded instruction had been given. Hence, we conclude that the giving of the erroneous CCP instruction in this case was harmless error.

Accordingly, finding no error warranting reversal, we affirm Foster's sentence of death.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

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IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT IN AND FOR BAY COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 75-486

CHARLES FOSTER,

Defendant.

2000 DEC 29 P 3:30

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS MATTER is before the Court on the Defendant's amended motion for postconviction relief filed on September 3, 1999. Having reviewed said motion, the court file, the State's response, and being otherwise fully advised this Court determined a "*Huff*" hearing was required. At the hearing both the State and the Defendant were given the opportunity to be heard on the need for an evidentiary hearing on any of the issues raised by the Defendant in his motion. Based on the arguments presented at the hearing and the motion this Court finds that:

The Defendant was sentenced, for the third time, to death for first degree murder and his conviction and sentences were affirmed. See Foster v. State, 654 So.2d 112 (Fla. 1995). On March 19, 1997, the Defendant filed a 3.850 "shell" motion raising numerous grounds for relief. The Defendant asked the Court for leave to amend so that when the various public agencies had complied with the Defendant's public records request, the Defendant could adequately support his claims or raise additional grounds. The Defendant further stated that the incomplete "shell" motion was filed in order to toll the time for filing his federal habeas corpus action and because he had not at that time been provided with conflict-free counsel, and he had not been able to adequately investigate and plead his claims with specificity. On September 8, 1998, the Court entered an Order Appointing Collateral Counsel for Capital Post Conviction Relief.

On September 7, 1999, the Defendant filed his Amended Motion for Post Conviction Relief and stated that "[f]or clarity, claims raised in 3.850 shell motion are either abandoned or incorporated in this amended 3.850. It is therefore unnecessary to refer to original 3.850." Thus, the Court will only address the matters raised in the Defendant's motion for postconviction relief filed on September 7, 1999. The Court directed the State to respond to the Defendant's claims. A status hearing was conducted on March 27, 2000, wherein the state alleged that it had not been directed by the Court to respond. The Court again directed the state to respond and the state filed its response in July 2000.

The Defendant alleges twenty-nine grounds in his motion, none of which warrant relief. The

The Defendant fails to factually support his argument. See Flint v. State, 561 So.2d 1343 (Fla. 1st DCA1990), see also LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998).

CLAIM XXX: *Mr. Foster's death sentence is predicated upon an automatic aggravating circumstance, contrary to the Eighth and Fourteenth Amendments. Trial counsel rendered ineffective assistance in this regard.*

The Defendant fails to factually support his claim. See Flint v. State, 561 So.2d 1343 (Fla. 1st DCA1990), see also LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998).

CLAIM A: GROUND I CONSTITUTIONALLY FLAWED HARMLESS ERROR ANALYSIS

The Defendant complains that the Florida Supreme Court "did not conduct a meaningful or constitutionally correct harmless error analysis" and claims that a harmless error analysis in a death penalty case violates due process, equal protection, and the Defendant's right to an impartial jury.

The sufficiency of a court's harmless error analysis cannot be raised in a motion for postconviction relief. See Shere v. State, 742 So.2d 215, 224 n.7 (Fla. 1999). A motion to vacate under Rule 3.850 must be directed to the judgment and sentence of the trial court and this Court is not authorized to review a ruling made by the Florida Supreme Court. Moreover, the United States Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by re-weighing of aggravating and mitigating evidence or by harmless error review. See Clemons v. Mississippi, 494 U.S. 738 (1990). Thus, the Defendant's claim is without merit.

CLAIM B: GROUND II VIOLATION OF RIGHT TO IMPARTIAL JURY

The Defendant alleges that he was denied his right to an impartial jury due to the Prosecutor's participation in the "venire pre-selection" process in Bay County. He claims the jury that tried him was not a fair cross-section of the community resulting in unconstitutional, systematic exclusion of a significant portion of the population from the jury pool.

The Defendant's claim is without merit. In Remata v. State, 522 So.2d 825 (Fla. 1988), the Florida supreme court said:

> It is important to understand the distinction between the general qualification of the jury by the court and the qualification of a jury to try a specific case. In the former, the court determines whether prospective jurors meet the statutory qualification standards or whether they will not qualify because of physical disabilities, positions they hold, or other personal reasons. The general qualification process is often conducted by one judge, who will qualify a panel for use by two, three, or more judges in multiple trials. Counsel or a defendant does not ordinarily participate in this type of qualification process, although neither is excluded from doing so. In many instances, counsel and the defendant are not present because this preliminary qualification process occurs days prior to the trial.

Id at 828

Section 40.013, Florida Statutes, provides that any expectant mother or parent with a young child may be exempted from jury duty on request, does not deny an accused his right to a fair cross section of the community on his jury. See Vasil v. State, 374 So.2d 465 (Fla. 1979), cert. den. 446 U.S. 967 (holding that the fact that provisions now contained in Fla. Stat. 40.013, which allows expectant mothers and mothers of minor children the option of being excluded from jury service does not violate a defendant's constitutional right to a jury trial from representational cross-section of community, because class made subject to being excluded under this section is not so distinctive as to invoke constitutional concern); Marshall v. Holmes, 365 F.Supp. 613 (N.D. Fla. 1973), affirmed 495 F.2d 1371, certiorari denied 95 S.Ct. 825, 420 U.S. 907, 42 L.Ed.2d 836 (the fact that female jurors having children under 18 years of age could obtain exemption from jury duty on their request did not invalidate jury selection statute); Parker v. State, 456 So.2d 436 (Fla. 1984).

The Defendant's reliance upon Alachua County Court Executive v. Anthony, 418 So.2d 264 (Fla.1982), is misplaced since that case dealt with whether the statute violated the equal protection clause since the statute as it read then, only excluded mothers and not fathers of minor children. The application of the then existing statute did not compromise the integrity of the jury. Thus, the Defendant's claim is without merit.

CLAIM C: GROUND III VIOLATION OF DOUBLE JEOPARDY PROTECTION

Next the Defendant claims a jury verdict as to both felony murder and premeditated murder constitutes fundamental error, amounting double jeopardy and due process violations. The Defendant claims when a jury reaches two separate verdicts and then conducts penalty phase deliberations, it is improperly influenced as to the existence of a cold, calculated and premeditated aggravator.

The Defendant's claim is procedurally barred. See Rutherford v. State, 727So.2d 216 (Fla. 1998). However, had the Defendant properly raised the claim, he would still be without relief. The Defendant does not allege that he was adjudicated on both the first degree murder and felony murder. Rather the Defendant admits that he was convicted of first degree murder and robbery and thus, there was no error. In Lamb v. State, 532 So.2d 1051 (Fla. 1988), the Florida supreme court found no constitutional problem where a defendant was indicted and found guilty of both first-degree premeditated and felony murder stemming from a single death, but was only adjudicated guilty of one murder charge. Thus, there the Defendant's claim is without merit. See Lamb v. State, 532 So.2d 1051 (Fla. 1988).

CLAIM D: GROUND IV DEFENDANT'S CONFINEMENT ON DEATH ROW FOR TWENTY THREE (23) YEARS CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

The Defendant's claim is without merit. See Knight v. State, 746 So.2d 423 (Fla. 1998) (holding that spending more than two decades on death row is not cruel and unusual punishment).

GROUND E: GROUND V CRUEL AND UNUSUAL PUNISHMENT

The Defendant claims he is "innocent of the death penalty" and the death penalty as a concept is cruel and unusual punishment. The Defendant's claim is without merit. See Davis v. State, 742 So.2d 233 (Fla. 1999); Provenzano v. Moore, 744 So.2d 413 (Fla. 1999); and Jones v. State, 591 So.2d 911, 916 (Fla.1991).

GROUND F: GROUND VI BRADY RULE VIOLATION

Last the Defendant claims a Brady violation and points to a letter that states the Defendant is "obviously mentally disturbed." The Defendant alleges that had this information been available, it would have "been compelling to a jury."

The Defendant has failed to allege prejudice as contemplated by Strickland and his motion is properly denied. The Defendant fails to allege the letter written in 1975 was something the state uniquely knew, which would require a Brady disclosure. See State v. Counce, 392 So.2d 1029 (Fla. 4th DCA 1981); Jones v. State, 732 So.2d 313 (Fla. 1999) (finding no Brady violation where the document was neither material or exculpatory); Robinson v. State, 707 So.2d 688, 693 (Fla.1998) (defendant did not carry his burden where record was not clear that state had suppressed evidence and where it was highly debatable that evidence was exculpatory). The Defendant merely states it would have been compelling to a jury, and does not allege the outcome of the proceedings would have been different. The possibility that an item of undisclosed information might have helped the defense, or might have affected outcome of trial, does not establish "materiality". See Gorham v. State, 521 So.2d 1067 (Fla. 1988). The Defendant does not allege when this information was discovered and thus, his claim is time barred.

Moreover, in light of the Defendant's admission the Defendant's claim cannot meet the requisite showing of prejudice. See Hegwood v. State, 575 So.2d 170, 172 (Fla.1991) (to establish Brady violation, one must prove that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different). The Defendant has previously raised a Brady claim to which the Florida Supreme Court ruled that "there is no reasonable probability that the outcome of the trial would have been different had any of the evidence Foster now asserts was not disclosed or not discovered been presented." Foster v. State, 614 So.2d 455 (Fla.1992). Thus, his claim is without merit. It is therefore,

ORDERED AND ADJUDGED that the Defendant's motion is hereby **DENIED.** Further, the Defendant has the right to appeal within thirty days from entry of this order.

DONE AND ORDERED in Bay County, Florida this 22 day of December, 2000.

HONORABLE DON T. SIRMONS
CIRCUIT JUDGE

40.02 Selection of jury lists by county commissioners.
40.03 Selection of jury lists in large counties.
40.04 Selection of jury lists in small counties.
40.05 Selection of jury lists in new counties.
40.06 Transcription and preservation of lists.
40.061 Addresses of persons on jury lists.
40.07 Persons disqualified.
40.08 Persons exempt from jury duty.
40.09 Jury commissions, counties exceeding 120,000.
40.10 Duties of commissioners; jury lists.
40.101 Use of mailed questionnaires.
40.11 Certification of jury lists.
40.13 Compensation of jury commissioners.
40.20 Deficiency in county.
40.22 Issuance of venire.
40.23 Summoning petit jurors.
40.231 Jury pools.
40.24 Pay of jurors.
40.25 Pay of jurors in vacation.
40.26 Meals for jurors.
40.27 Failure of jurors to attend; penalty.
40.271 Jury service.
40.28 Failure to draw or summon jurors; punishment.
40.29 Clerks to estimate amount for pay of jurors and witnesses and make requisition.
40.30 Requisition endorsed by Comptroller and countersigned by Governor.
40.31 Comptroller may apportion appropriation.
40.32 Clerks to disburse money.
40.33 Deficiency.
40.34 Clerks to make triplicate payroll.
40.35 Accounting and payment to the Comptroller.
40.36 Drawing jury venire; petit and grand; term and vacation.
40.371 Drawing jury venire; alternative method.
40.39 Clerk of court; duty.
40.40 Drawing grand jurors.
40.41 Petit jurors; length of service.
40.42 Deficiency of jurors.
40.43 Deficiency or excess in jury box; omissions, etc.

40.01 Qualifications and disqualifications of jurors.—

(1) Grand and petit jurors shall be taken from the male and female persons at least 18 years of age, who are citizens of this state and who have resided in this state for 1 year and in their respective counties for 6 months, and who are fully qualified electors of their respective counties; however, expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty.

(2) No person who shall have been convicted of bribery, forgery, perjury, or larceny within this state or under the laws of any other state, government or state, government or country or a crime which committed within this state, would be a felony, shall be qualified to serve as a juror unless restored to civil rights.

(3) In the selection of jury lists only such persons as the selecting officers know, or have reason to believe, are law-abiding citizens of approved integrity, good character, sound judgment and intelligence, and who are not physically or mentally infirm, shall be selected for jury duty.

(4) Where in the laws of Florida pertaining to jurors and the preparation of jury lists reference is made to male persons, such reference shall in each instance be taken and construed to mean male and female persons.

(5) Wherever jurors are required by law or by order of court, to be kept together during the conduct of a trial, or while considering their verdict, or whenever by order of court lodging is required to be furnished juries, separate lodging and rest room facilities shall be provided for jurors of different sexes, and under contemplation of law jurors shall be deemed to have been kept together whenever the jurors of different sexes occupy the accommodations provided for their respective sexes.

(6) Whenever female persons are sitting on any jury, and it becomes necessary that said jurors be committed to the charge of an officer, a female bailiff or deputy sheriff shall be provided to attend said jury in addition to the male officer to whom such juries are customarily committed, and all existing laws relating to the powers, duties and obligations of such male officer shall apply with like force and effect to such female officer.

History.—s. 2, ch. 4015, 1891; ss. 1, 2, ch. 4122, 1893; GS 1570, 1571; s. 1, ch. 6531, 1913; RGS 2771, 2772; ss. 1, 2, ch. 12068, 1927; CGL 4443, 4444; s. 1, ch. 25126, 1949; ss. 1, chs. 26514, 26581, 26848, 1951; ss. 1, 2, ch. 67-154; s. 1, ch. 73-79.

40.02 Selection of jury lists by county commissioners.—

(1) SELECTION OF LISTS, GENERALLY.—In all counties, except those having a jury commission, the county commissioners shall hold a meeting during the first week in January of each year or as soon thereafter as practicable and at such other times as the circuit judge may order, for the purpose of selecting jury lists. At such meeting said commissioners shall personally select from the lists of persons who are qualified to serve as jurors under the provisions of s. 40.01, and make out a list of not less than 250 nor more than 1500 persons properly qualified to serve as jurors, which list shall be signed and verified by said commissioners as having been personally selected as aforesaid and as possessing the prescribed qualifications according to their best information and belief. Said list shall be forthwith delivered to the clerk of the circuit court and by him recorded in the minute book of the board of county commissioners.

(2) SELECTION OF LESS THAN MINIMUM NUMBER.—If, in any county of this state, the county commissioners shall not be able to select the number required by this section they shall be authorized to select a less number.

(3) ADDITIONAL LISTS.—The circuit judge may require the county commissioners to select additional jury lists from time to time as may appear to such judge to be necessary to avoid the names selected becoming exhausted.

(4) DISQUALIFICATION, EFFECT OF.—If any person so selected shall be ascertained to be disqualified or incompetent to serve as a juror, such disqualification shall not effect the legality of such list or be cause of challenge to the array of any jury chosen from such list, but any person ascertained to be disqualified to serve as a juror, shall be subject to challenge for cause, as defined by law.

(5) EFFECT OF PRIOR JURY SERVICE.—The fact that any person so selected had been on a former jury list or had served as a juror in any court at any time shall not be grounds for challenge of such person as a juror.

History.—s. 2, ch. 4015, 1891; s. 2, ch. 4122, 1893; GS 1571; s. 1, ch. 6531, 1913; RGS 2772; s. 2, ch. 12068, 1927; CGL 4444; s. 1, ch. 28281, 1953; s. 3, ch. 67-154; s. 6, ch. 73-334.

40.03 Selection of jury lists in large counties.—In each county, except those counties having a jury commission, which has or may have a population exceeding 85,000, according to the last preceding state or federal census, the county commissioners, in selecting and making up the lists of persons to serve as jurors as provided by law, shall select and make out a list of not less than 1,000 nor more than 2,000 persons qualified to serve as jurors.

History.—s. 1, ch. 7753, 1918; RGS 2773; s. 3, ch. 12068, 1927; CGL 4445; s. 1, ch. 21740, 1943.

40.04 Selection of jury lists in small counties.—In each county which has a population of less than 6,000 inhabitants, according to the last preceding state census, the board of county commissioners at the time and in the manner provided by law shall select and make out a list of not less than 200 nor more than 250 persons properly qualified to serve as jurors.

History.—s. 1, ch. 7840, 1919; CGL 4446.

40.05 Selection of jury lists in new counties.—The county commissioners of any new county hereafter created, at the first meeting of such board of county commissioners provided for in the act creating such new county or as soon thereafter as practicable, shall select from the list of persons who are qualified to serve as jurors under the provisions of ss. 40.01 and 40.02, and shall make a list as provided by s. 40.02, which list shall be signed and recorded as provided by s. 40.02. The clerk of the circuit court shall write the said names on pieces of paper and place such pieces of paper in a box and shall close and seal such box as provided by s. 40.06, and shall otherwise comply with all the provisions of s. 40.06.

History.—ss. 1, 2, ch. 8519, 1921; CGL 4447, 4454; s. 7, ch. 22868, 1945; s. 4, ch. 67-154.

40.06 Transcription and preservation of lists.—On receiving the list of persons selected as qualified to serve as jurors, as provided for in s. 40.02, the clerk of the circuit court, in the presence of the coun-

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40.02 Selection of jury lists by county commissioners.
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40.01 Qualifications and disqualifications of jurors.—

*(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state and who have resided in this state for one year and in their respective counties for six months and who are fully qualified electors of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen years of age, upon

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40.30 Requisition endorsed by comptroller and countersigned by governor.
40.31 Comptroller may apportion appropriation.
40.32 Clerks to disburse money.
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40.40 Drawing grand jurors.
40.41 Petit jurors; length of service.
40.42 Deficiency of jurors.
40.43 Deficiency or excess in jury box; omissions, etc.

during the conduct of a trial, or while considering their verdict, or whenever by order of court lodging is required to be furnished juries, separate lodging and rest room facilities shall be provided for jurors of different sexes, and under contemplation of law jurors shall be deemed to have been kept together whenever the jurors of different sexes occupy the accommodations provided for their respective sexes.

(6) That whenever female persons are sit-

(4) DISQUALIFICATION, EFFECT OF.—If any person so selected shall be ascertained to be disqualified or incompetent to serve as a juror, such disqualification shall not effect the legality of such list or be cause of challenge to the array of any jury chosen from such list, but any person ascertained to be disqualified to serve as a juror, shall be subject to challenge for cause, as defined by law.

(5) EFFECT OF PRIOR JURY SERVICE.—The fact that any person so selected had been on a former jury list or had serves as a juror in any court at any time shall not be grounds for challenge of such person as a juror.

History.—s. 2, ch. 4015, 1891; s. 2, ch. 4122, 1893; GS 1571; s. 1, ch. 6531, 1913; RGS 2772; s. 2, ch. 12068, 1927; CGL 4444; s. 1, ch. 28281, 1953; s. 3, ch. 67-154; s. 6, ch. 73-334.

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History.—s. 1, ch. 7753, 1918; RGS 2773; s. 3, ch. 12068, 1927; CGL 4445; s. 1, ch. 21740, 1943.

40.04 Selection of jury lists in small counties.—

to serve as jurors, which list shall be signed and verified by said commissioners as having been personally selected as aforesaid and as possessing the prescribed qualifications according to their best information and belief. Said list shall be forthwith delivered to the clerk of the circuit court and by him recorded in the minute book of the board of county commissioners.

(2) SELECTION OF LESS THAN MINIMUM NUMBER.—If, in any county of this state, the county commissioners shall not be able to select the number required by this section they shall be authorized to select a less number.

(3) ADDITIONAL LISTS.—The circuit judge may require the county commissioners to select additional jury lists from time to time as may appear to such judge to be necessary to avoid the names selected becoming exhausted.

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(5) EFFECT OF PRIOR JURY SERVICE.—The fact that any person so selected had been on a former jury list or had served as a juror in any court at any time shall not be

Charles Kenneth FOSTER, Appellant,
v.
STATE of Florida, Appellee.

No. 48380.

Supreme Court of Florida.

Feb. 22, 1979.

Rehearing Denied May 10, 1979.

The Circuit Court, Bay County, Mercer P. Spear, J., convicted defendant of first-degree murder and of robbery and imposed death sentence, and defendant appealed. The Supreme Court, Adkins, J., held that: (1) trial court did not commit reversible error in allowing removal for cause of prospective jurors who stated that they could not and would not return verdict of guilty if penalty might result in death; (2) trial court did not err in admitting into evidence gruesome and offensive photographs; (3) death penalty statute was constitutional, and (4) aggravating circumstances supporting death penalty were proved beyond a reasonable doubt.

Affirmed.

[1] JURY ⇐108
230k108
Person who has beliefs which preclude him from finding defendant guilty of an offense punishable by death is not qualified as a juror in a capital case. West's F.S.A. § 913.13.

[2] CRIMINAL LAW ⇐1166.16
110k1166.16
In murder prosecution, trial court did not commit reversible error in allowing removal for cause of prospective jurors who indicated that they could not and would not return verdict of guilty if penalty might result in death. West's F.S.A. § 913.13.

[3] CRIMINAL LAW ⇐438(7)
110k438(7)
In murder prosecution, trial court did not err in admitting into evidence gruesome and offensive photographs, even though there was no question as to identity of victim and cause of death.

[4] STIPULATIONS ⇐14(10)
363k14(10)
A defendant cannot, by stipulating as to identity of homicide victim and cause of death, relieve State of its burden of proof beyond reasonable doubt.

[5] CRIMINAL LAW ⇐1206.1(2)
110k1206.1(2)
Formerly 110k1206(1)
Death penalty statute is constitutional. West's F.S.A. § 921.141(5).

[6] HOMICIDE ⇐357(4)
203k357(4)
Formerly 203k354
In murder prosecution, aggravating circumstances supporting death penalty were proved beyond reasonable doubt. West's F.S.A. § 921.141(5).

[7] HOMICIDE ⇐357(4)
203k357(4)
Formerly 203k354
When one or more of aggravating circumstances is found, death is presumed to be proper sentence unless it or they are overridden by one or more of the mitigating circumstances; all evidence of mitigating circumstances may be considered by judge or jury. West's F.S.A. § 921.141(5).

***928** Louis G. Carres, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Richard W. Prospect, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death. He was also adjudged guilty of robbery and sentenced to life imprisonment.

Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met defendant and ***929** the victim, Julian Lanier, at a bar. They knew defendant, but the victim was a stranger.

The girls, after a discussion, agreed to go the the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The victim was quite intoxicated and surrendered the driving chore to Gail. The defendant and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.

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Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. Defendant then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so defendant took a knife and cut the victim's spine.

The girls and defendant then drove off in the Winnebago and found the victim's wallet underneath a mattress. The defendant and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.

The next morning Anita Rogers went to the Sheriff's Department and reported what had happened. She had been committed to a mental institution when she was 13 years of age and was not charged with any offense in this case.

Defendant was charged by an indictment with the offenses of first-degree murder and robbery.

The defendant testified and, during his description of the events of the evening, testified as follows:

> I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him.

The jury returned verdicts finding defendant guilty of robbery, premeditated murder in the first degree, and felony murder. After the sentence hearing, the jury returned an advisory verdict unanimously recommending that defendant receive the death penalty. The court then proceeded to sentence defendant to death on the murder charge and to life imprisonment on the robbery charge.

Defendant says error was committed when the trial court excused certain prospective jurors because of their conscientious objection to the death penalty, relying upon the following principle enunciated in Witherspoon v. Illinois, 391 U.S. 510, 521-23, 88 S.Ct. 1770, 1776-7, 20 L.Ed.2d 776 (1968):

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

The decisions of this Court have been in accord with the holding in the Witherspoon case, Supra. See Campbell v. State, 227 So.2d 873 (Fla.1969); Paramore v. State, 229 So.2d 855 (Fla.1969).

[1] A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death is not qualified as a juror in a capital case. Section 913.13, Florida Statutes (1975).

[2] The voir dire examination discloses that Joe C. Smith could not and would not return a verdict of guilty if the penalty might result in death. A similar situation existed as to prospective juror John Douglas Hunt. The prospective juror Deloris Swearington was not as adamant as the others, but she was challenged peremptorily and not for cause. Only two jurors were ***930** challenged for cause over objections of defendant because of their beliefs against the death penalty. Similar objections were found to be without merit in Campbell v. State, supra; Williams v. State, 228 So.2d 377 (Fla.1969); Perkins v. State, 228 So.2d 382 (Fla.1969); Paramore v. State, supra; and Portee v. State, 253 So.2d 866 (Fla.1971). The lower court did not commit reversible error in allowing the removal for cause of these prospective jurors. We might add that the defendant, in his testimony, made the following statements:

> Well, if the judge will accept my plea of guilty and Guarantee I will be electrocuted for taking this man's life, that's what I want. I got this robbery charge, you know, we didn't rob that man.
> Anybody knows you can't take nobody's life and That's why I want to die for it. I mean I ain't crazy. I don't know if I got demons in me or not, but I believe I do. I went to church Sunday night to get them taken out. (Emphasis added.)

[3] Defendant also complains that gruesome and inflammatory photographs were admitted into evidence, saying that they were unduly prejudicial. Defendant argues that there was no question as to the identity of the victim or the cause and manner of his death, so the photographs served no evidentiary purpose.

The photographs were indeed gruesome and

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offensive. However, they met the guidelines set by this Court in Bauldree v. State, 284 So.2d 196, 197 (Fla.1973):

> In State v. Wright, 265 So.2d 361 (Fla.1972), we commented on and stated the proper test as follows:
> ". . . Appellant interprets the Young case (Young v. State, 234 So.2d 341 (Fla.1970)) as holding that 'necessity' rather than 'relevancy' is the test for admissibility of gruesome photographs. 'Necessity' may be a consideration where, as in Young, large numbers of cumulative photographs of a gruesome nature taken away from the scene of the crime, are offered into evidence. But relevancy remains the basic test, as stated in Young: (5. Id. at 347)
> 'The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs, particularly in large numbers must have same (sic) relevancy, either independently or as corroborative of other evidence.'
> "Thus, the current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of 'whether cumulative,' or 'whether photographed away from the scene,' are routine issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence."

[4] A defendant cannot, by stipulating as to the identity of a victim and the cause of death, relieve the State of its burden of proof beyond a reasonable doubt.

One photograph was introduced during the penalty phase of the proceeding to show that the death blow was delivered with such tremendous impact that it went through the victim's spinal column and severed the victim's spinal cord. This was evidence of the atrocious manner in which the victim was murdered and the deliberate, cold-blooded intent of the defendant.

[5] Defendant contends that the death penalty statute is unconstitutional. He recognizes that the statute was upheld in State v. Dixon, 283 So.2d 1 (Fla.1973), and Alford v. State, 307 So.2d 433 (Fla.1975), but requests that we reexamine our prior decision. He argues that the statute does not meet constitutional muster because of the discretion of the state attorney in making the charge, as well as the discretion of the state attorney to plea bargain. He also refers to the discretion of the jury to convict a defendant of a homicide less than capital and thereby spare defendant's life. He also refers to the discretion involved in *931 grants of executive clemency. All of these objections have been considered by this Court, as well as the Supreme Court of the United States. The Florida death penalty statute is constitutional. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

At the sentence hearing the defendant produced Dr. John F. Mason, a psychiatrist, who testified as to the mental and emotional condition of the defendant. The defendant also produced his former wife who testified concerning the mental and emotional instability of the defendant. The jury recommended that the death sentence be imposed. The trial judge found that the murder was committed while defendant was engaged in the commission of a robbery and that the capital felony was especially heinous and atrocious. He found that sufficient aggravating circumstances existed as enumerated in Section 921.141(5), Florida Statutes (1975), that justified a sentence of death. He found that there were no mitigating circumstances to outweigh the aggravating circumstances. There was no presentence report filed in the case or considered by the trial judge.

Defendant contends that the felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and the trial court did not consider this mitigating factor. The following instruction was given to the jury before they deliberated upon the penalty:

> If one or more aggravating circumstances are established you should consider all the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusions as to the sentence which should be imposed.

Before imposing the death sentence, the trial judge considered three psychiatric reports (with which defendant's attorney was familiar) and found that there were no mitigating circumstances sufficient to overcome the heinous nature of the homicide. The defendant committed the homicide in an effort to fulfill his intentions and complete his desire, I. e., "ripping the victim off." An elderly gentleman had agreed to go out and have some fun, but the price of such activity was his life. Defendant showed no compassion when he cut the victim's throat, beat him,

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dragged him into the woods, and cut his spine with a knife. As described by one witness, there was no air coming from the body of the victim after she heard "the cracking" of the spine.

[6][7] The aggravating circumstances were proved beyond a reasonable doubt. As stated in State v. Dixon, 283 So.2d at 9,

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. s 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

In Sullivan v. State, 303 So.2d 632 (Fla.1974), the sentence of death was appropriate where defendant and an accomplice conducted an assistant manager of a restaurant to a swampy area, fully intending to murder such victim, and where the 25-year-old defendant with no prior criminal record shot the victim with both barrels of a shotgun in the back of the head.

The death sentence was appropriate when a murder was committed while the defendant was engaged in the burglary of the deceased's home. This murder was found to be especially heinous, atrocious, and cruel, and the jury recommended the death penalty. The defendant had been previously convicted of burglary (this differs from defendant Foster), but the atrocious nature of the crime coupled with the burglary were other aggravating circumstances sufficient to warrant the death penalty. Proffitt v. State, 315 So.2d 461 (Fla.1975), Aff'd, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Where defendant had a lengthy history of violence (just as defendant Foster), had demonstrated callous indifference to human life, and where his acts were for pecuniary gain, the death penalty was properly imposed. Henry v. State, 328 So.2d 430 (Fla.1976).

Although the findings of the trial judge in the case Sub judice were not expansive, *932 the justification of his sentence of death in writing was sufficient to show that the sentence of death resulted from reasoned judgment. This reasoned judgment comports with our consideration of other cases and the sentence of death was appropriate under the circumstances.

Other questions raised by defendant have been considered and are without merit.

The judgments and sentences of the trial court are affirmed.

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

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Charles Kenneth FOSTER, Appellant,
v.
STATE of Florida, Appellee.

No. 76639.

Supreme Court of Florida.

Oct. 22, 1992.

Rehearing Denied April 1, 1993.

Defendant was convicted in the Circuit Court, Bay County, of murder and sentenced to death and he appealed. The Supreme Court affirmed, 369 So.2d 928. Denial of first and second postconviction motions were affirmed by the Supreme Court, 400 So.2d 1, and 518 So.2d 901, but resentencing was ordered. Denial of federal habeas corpus petitions was affirmed by the Court of Appeals, 707 F.2d 1339, 823 F.2d 402. On remand from resentencing, the Circuit Court, Bay County, Don T. Sirmons, J., entered sentence of death and defendant appealed. The Supreme Court held that: (1) defendant had not received ineffective assistance of counsel; (2) jury was adequately instructed on mitigating circumstances; (3) court properly overruled challenges for cause; but (4) sentencing order was defective for failing to state whether court had found certain mitigating circumstances to exist.

Affirmed in part and vacated and remanded in part.

Barkett, C.J., concurred in part and dissented in part and filed an opinion in which Shaw and Kogan, JJ., concurred.

Kogan, J., concurred in part and dissented in part and filed an opinion.

[1] CRIMINAL LAW ⚖998(21)
110k998(21)
Successive postconviction motion may be dismissed if it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the failure to raise those issues in prior motion constitutes an abuse of process. West's F.S.A. RCrP Rule 3.850.

[2] CRIMINAL LAW ⚖998(21)
110k998(21)
Postconviction motion alleging ineffective assistance of counsel was an abuse of process where there was no showing of justification for the failure to raise it in either of the two prior motions. West's F.S.A. RCrP Rule 3.850.

[3] CRIMINAL LAW ⚖641.13(6)
110k641.13(6)
In view of defendant's confession, there was no reasonable probability that outcome of trial would have been different had counsel obtained additional evidence, so that defendant did not show ineffective assistance of counsel.

[4] CRIMINAL LAW ⚖996(3)
110k996(3)
Witness' unavailability at resentencing hearing, so as to make her prior testimony admissible, was established by evidence that investigators had been unable to locate her or her former husband, that they had called telephone number given to them a number of times and have left messages for the witness, who never returned the calls, and that attempts to subpoena her were unsuccessful.

[5] CRIMINAL LAW ⚖662.60
110k662.60
Defendant's right to confrontation was not abridged when prior testimony of witness was admitted at resentencing hearing where court admitted the witness' cross-examination testimony in addition to her direct testimony.

[6] WITNESSES ⚖337(4)
410k337(4)
It was not an abuse of discretion to exclude evidence of witness' 1989 convictions when admitting at resentencing hearing testimony which she had given at the first trial in 1975.

[7] CRIMINAL LAW ⚖996(3)
110k996(3)
There was no Brady violation by state's failure to provide defendant with mental health records of witnesses at resentencing hearing where the state denied having the records.

[8] HOMICIDE ⚖357(3)
203k357(3)
Finding that murder was especially heinous, atrocious, or cruel, and cold, calculated, and premeditated, thus authorizing imposition of death penalty, was supported by evidence that victim was severely beaten prior to having his throat slit, that victim was pulled from vehicle by his genitals and stabbed in the throat a second time, that he would have lived 20 to 30 minutes after the wound was inflicted, that defendant then cut the victim's spine with a knife, and that victim would have lived three to five minutes after the spinal cord was severed. West's F.S.A. § 921.141(5)(h, i).

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[8] HOMICIDE ⚖357(11)
203k357(11)
Finding that murder was especially heinous, atrocious, or cruel, and cold, calculated, and premeditated, thus authorizing imposition of death penalty, was supported by evidence that victim was severely beaten prior to having his throat slit, that victim was pulled from vehicle by his genitals and stabbed in the throat a second time, that he would have lived 20 to 30 minutes after the wound was inflicted, that defendant then cut the victim's spine with a knife, and that victim would have lived three to five minutes after the spinal cord was severed. West's F.S.A. § 921.141(5)(h, i).

[9] HOMICIDE ⚖311
203k311
Jury was adequately instructed that it could consider any relevant evidence in determining whether to impose the death penalty where court informed the jurors that they could consider, in addition to other factors, "any other factor of defendant's character or record and any other circumstance of the crime or offense," and defense counsel discussed mental health mitigation in detail.

[10] HOMICIDE ⚖341
203k341
Error in failing to give defendant's requested instruction containing an expanded definition of the aggravating factor that the homicide was heinous, atrocious, and cruel was harmless where defendants' killing of victim was especially heinous, atrocious, and cruel by any standard.

[11] JURY ⚖90
230k90
Court was not required to strike for cause at resentencing hearing in capital murder prosecution juror who indicated bias against persons who have had numerous appeals, person who went to junior high school with defendant and "had a couple of fights" with him, and person who was allegedly predisposed to imposing death penalty for all premeditated murders.

[11] JURY ⚖105(1)
230k105(1)
Court was not required to strike for cause at resentencing hearing in capital murder prosecution juror who indicated bias against persons who have had numerous appeals, person who went to junior high school with defendant and "had a couple of fights" with him, and person who was allegedly predisposed to imposing death penalty for all premeditated murders.

[11] JURY ⚖108
230k108
Court was not required to strike for cause at resentencing hearing in capital murder prosecution juror who indicated bias against persons who have had numerous appeals, person who went to junior high school with defendant and "had a couple of fights" with him, and person who was allegedly predisposed to imposing death penalty for all premeditated murders.

[12] JURY ⚖108
230k108
Court properly excused venire member who stated on voir dire before resentencing hearing in capital murder prosecution that she did not believe that she could vote to impose the death penalty in any situation other than murder within a prison setting.

[13] HOMICIDE ⚖358(1)
203k358(1)
In the absence of evidence that state's attorney acted with purposeful discrimination in seeking death penalty in defendant's case, court was not required to hold evidentiary hearing on claim that use of the death penalty in the county was racially discriminatory, based on statistical evidence indicating that persons whose victims were white were more likely to be charged with first-degree murder and convicted of first-degree murder.

[14] HOMICIDE ⚖358(3)
203k358(3)
Court's statement in sentencing order imposing death penalty in murder case that it had considered the evidence in support of mitigating factors and that the mitigating circumstances were outweighed by the aggravating factors did not demonstrate that it had determined whether the two statutory mental mitigating circumstances existed or whether any mitigating circumstances were found to exist or what weight was given to them, so that the sentencing order was defective; error was not harmless.

*457 Richard H. Burr and Steven W. Hawkins of NAACP Legal Defense and Educational Fund, Inc., New York City, and Steven L. Seliger, Quincy, for

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appellant.

Robert A. Butterworth, Atty. Gen., and Mark C. Menser, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Charles Kenneth Foster appeals the sentence of death imposed upon him after resentencing. He also appeals the denial of his motion for postconviction relief. Our jurisdiction is based upon article V, section 3(b)(1), Florida Constitution.

Foster was convicted of murder and sentenced to death in 1975. This Court affirmed the conviction and death sentence in Foster v. State, 369 So.2d 928, 929 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). The following facts are set forth in that opinion:

> Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met defendant and the victim, Julian Lanier, at a bar. They knew defendant, but the victim was a stranger.
> The girls, after a discussion, agreed to go to the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The victim was quite intoxicated and surrendered the driving chore to Gail. The defendant and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe. Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. Defendant then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so defendant took a knife and cut the victim's spine.
> The girls and defendant then drove off in the Winnebago and found the victim's wallet underneath a mattress. The defendant and the girls split the money *458 found in the wallet and left the vehicle parked in the parking lot of a motel.
> The next morning Anita Rogers went to the Sheriff's Department and reported what had happened....

Foster, 369 So.2d at 928-29.

The trial court denied relief on Foster's first postconviction motion, and this Court affirmed Foster v. State, 400 So.2d 1 (Fla.1981). In addition, federal courts denied Foster relief on two federal habeas petitions. Foster v. Dugger, 823 F.2d 402 (11th Cir.1987), cert. denied, 487 U.S. 1241, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988); Foster v. Strickland, 707 F.2d 1339 (11th Cir.1983), cert. denied, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984). In Foster v. State, 518 So.2d 901 (Fla.1987), cert. denied, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 945 (1988), we affirmed the denial of Foster's second postconviction motion, but we granted his habeas petition and ordered resentencing due to Hitchcock [FN1] error.

> FN1. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

On remand for resentencing, Foster filed a 3.850 motion. The trial court refused to continue the resentencing hearing until resolution of the 3.850 motion. Following the jury's 8-4 recommendation, the trial judge imposed the death penalty. [FN2] Thereafter, the court summarily denied the 3.850 motion without an evidentiary hearing.

> FN2. The trial court found three aggravating circumstances: (1) the murder was committed during the course of a robbery; (2) the murder was cold, calculated, and premeditated; and (3) the murder was especially heinous, atrocious, or cruel. Foster offered thirteen mitigating circumstances. The trial court found that the mitigation did not outweigh the aggravating circumstances.

We address first Foster's claim that the trial court erred in denying his 3.850 motion without an evidentiary hearing. Foster's motion alleged a violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and ineffective assistance of trial counsel. The Brady claim centers around Foster's allegation that the state failed to disclose that it offered Gail Evans and Anita Rogers deals in exchange for their testimony at trial. Although the court did not hold an evidentiary hearing on this claim, Foster presented the evidence on which he relies to support the claim at a hearing on his motion to preclude admission of Rogers' and Evans' 1975 trial testimony. Rogers' ex-husband testified that several years after the trial, Rogers told him that the state had promised not to prosecute her in return for her testimony.

In his claim of ineffective assistance of counsel, Foster asserts that trial counsel failed to discover that

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Rogers and Evans believed that Foster was "crazy" at the time of the attack. Had counsel been aware of this, Foster reasons, he would have pursued mental health defenses that would have precluded a finding of premeditated murder. He also alleges that counsel failed to discover, or alternatively the state failed to disclose, that Foster cut off the victim's penis during the course of the attack.

[1] This is Foster's third postconviction motion. A successive motion may be dismissed if it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the failure to raise those issues in a prior motion constitutes an abuse of process. Fla.R.Crim.P. 3.850. To overcome this bar, a movant must allege that the grounds asserted were not known and could not have been known to him at the time of the earlier motion. Christopher v. State, 489 So.2d 22, 24 (Fla.1986). The movant must show justification for the failure to raise the issues in the prior motions. Id.

[2] Foster alleged ineffective assistance of trial counsel in his initial postconviction motion. We rejected that claim on the merits. [FN3] Foster, 400 So.2d 1. Foster has *459 not previously raised a Brady claim. Although he alleges the discovery of new facts in order to avoid application of the abuse of process doctrine, he has failed to demonstrate or even allege that the facts could not have been known to him at the time of his earlier motions. We note that Foster has been represented by the same counsel since at least the time of the appeal of the denial of his first postconviction motion in 1981. Having failed to show any justification for his failure to raise the present claims in his earlier postconviction motions, the instant motion constitutes an abuse of process. Spaziano v. State, 545 So.2d 843 (Fla.1989); Tafero v. State, 524 So.2d 987, 988 (Fla.1987); Booker v. State, 503 So.2d 888, 889 (Fla.1987); Christopher v. State, 489 So.2d at 25. [FN4]

> FN3. In addition, we note that Foster raised ineffective assistance of counsel claims in his two federal habeas petitions. The claims were denied after evidentiary hearing and the denials were affirmed on appeal. Foster v. Dugger, 823 F.2d 402 (11th Cir.1987), cert. denied, 487 U.S. 1241, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988); Foster v. Strickland, 707 F.2d 1339 (11th Cir.1983), cert. denied, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984).

> FN4. In addition, we note that the motion was filed outside of the limitations period established by rule 3.850. The motion fails to allege that the facts upon which his claims are based "could not have been ascertained by the exercise of due diligence." Fla.R.Crim.P. 3.850.

[3] Even if there were no procedural bar, Foster's claim would not prevail. At trial, Foster made a witness stand confession in which he stated:

> I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him.

369 So.2d at 929. In light of Foster's confession, there is no reasonable probability that the outcome of the trial would have been different had any of the evidence Foster now asserts was not disclosed or not discovered been presented. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (one alleging ineffective assistance of counsel must show deficient performance and prejudice); Hegwood v. State, 575 So.2d 170, 172 (Fla.1991) (to establish Brady violation, one must prove that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different).

[4] Gail Evans personally testified at the resentencing hearing. However, over Foster's objection, the court allowed the state to introduce the testimony of Anita Rogers from the 1975 trial. Foster claims that the court failed to conduct an appropriate inquiry into Rogers' unavailability before admitting her prior trial testimony and that the use of her testimony abridged his right of confrontation.

We find no error in the trial court's determination that Rogers was unavailable. According to the assistant state attorney, in 1989, in an effort to find Rogers, investigators from that office attempted to locate her ex- husband. They were unsuccessful. In late May of 1990, shortly before the resentencing proceeding, defense counsel gave the state attorney Rogers' address and telephone number in Tampa. The state attorney called the number several times. He left messages on an answering machine as well as with a man who answered the telephone and said that he was Rogers' former brother-in-law. Rogers never returned the phone calls. At the state attorney's request, the

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Hillsborough County Sheriff's Department attempted to subpoena Rogers but were unsuccessful. A deputy attempting to serve the subpoena was advised by someone at Rogers' address that she was out of town at an unknown location. This was sufficient to establish Rogers' unavailability for purposes of the resentencing hearing.

[5] Further, Foster's right of confrontation was not abridged. The court admitted Rogers' cross-examination in addition to her direct testimony. The court also allowed Foster to rebut Rogers' testimony with other witnesses. Under these facts we find no error in the admission of Rogers' trial testimony. See Hitchcock v. State, 578 So.2d 685, 690 (Fla.1990) (upholding the admission in resentencing proceeding ***460** of trial transcript where the state was unable to locate the witness and the court admitted the witness's entire trial testimony, including cross examination), cert. denied, 502 U.S. 912, 112 S.Ct. 311, 116 L.Ed.2d 254 (1991).

[6] At resentencing, Foster sought to impeach Rogers' trial testimony by introducing evidence that she had been convicted of false reporting of a crime and grand larceny in 1989. The trial court excluded evidence of the convictions, apparently finding that the 1989 convictions were not probative of Rogers' truth and veracity at the time of the 1975 testimony. We find no abuse of discretion in the exclusion of this evidence. Teffeteller v. State, 495 So.2d 744, 745 (Fla.1986). ("[I]t is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence.").

[7] One day before the resentencing proceeding was scheduled to begin, Foster filed a motion pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, asking the court to require the state to disclose Rogers' and Evans' mental health records. The state attorney objected, indicating the state did not have the records and had no better access to the records than did defense counsel. Foster challenges the trial court's denial of his motion.

Foster has not shown a Brady violation. The state denied having the records. Further, Foster made no showing that he could not have obtained this evidence with reasonable diligence. See Hegwood v. State, 575 So.2d 170, 172. Foster cites no case for his proposition that it was the state's obligation, rather than his own, to obtain such records.

[8] Foster also claims that the trial court erred in finding the murder to be especially heinous, atrocious, or cruel [FN5] and cold, calculated and premeditated. [FN6] The court relied on the following evidence to find the aggravating factor of especially heinous, atrocious, or cruel:

> FN5. § 921.141(5)(h), Fla.Stat. (1989).
>
> FN6. § 921.141(5)(i), Fla.Stat. (1989).

> The circumstances of the killing indicate a consciousless and pitiless regard for the victim's life and was unnecessarily tortuous to the victim, Julian Franklin Lanier. The victim did not die an instantaneous type of death. The victim was severely beaten prior to death. His nose was fractured, his face was severely bruised and his eyes were swollen shut from edema from hemorrhage and swelling resulting from the beating. After beating the victim, the defendant took out a knife and told the victim "I'm going to kill you; I'm going to kill you." There is evidence that one of the girls present asked the defendant not to do it. The defendant then proceeded to stab the victim in the throat. There is evidence of a defensive wound to the victim's hand which indicates the victim attempted to fend off the knife as the defendant stabbed him in the throat.
> After stabbing the victim in the throat, the defendant grabbed the victim by his testicles, or genitals, in order to move the victim outside. The victim groaned or moaned and the defendant stabbed the victim in the throat a second time. This second wound cut the victim's internal and external jugular veins. The victim could have lived from 20 to 30 minutes after this wound was inflicted.
> Neither of these wounds to the neck severed the victim's vocal cords. There is evidence that the victim asked the defendant not to do it again before he was stabbed a second time.
> After the second stab wound, the victim was dragged into the woods where he was covered with bushes. The marks on the victim's body indicated to the medical examiner, that the victim was either alive or dead a very short time before he was being dragged. It is consistent with what happened next to assume the victim was alive.
> After the victim was covered in the woods, one of the girls accompanying the ***461** defendant reported to the defendant that she could hear the victim breathing. The defendant then went back to the victim, who was lying face down, uncovered him and cut the victim's spine with a knife. As described by one witness, there was no air coming from the body of the victim after she heard "the cracking" of the spine. The medical examiner indicated the victim could have lived 3 to 5 minutes after his spinal cord was severed.
> This evidence establishes that the murder was especially heinous, atrocious, or cruel.

The trial court relied on these same facts to find the murder to be cold, calculated, and premeditated. In addition, the court relied on Foster's witness stand confession and Anita Rogers' trial testimony. Rogers testified that prior to the attack, Foster asked her to exchange class rings with him. Foster's ring bore the initial "K." He told Rogers that he wanted to switch rings because his ring would have left "K" impressions on the victim, thus identifying him as the perpetrator. As the prosecutor argued to the jury, if Foster had not intended to kill the victim, it would have made no difference if there were "K" impressions on the victim because he would have been alive to identify Foster. These facts establish the existence of a careful plan or prearranged design to kill. [FN7] Rogers v. State, 511 So.2d 526, 533 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

> FN7. Foster also contends that the application of the cold, calculated, and premeditated aggravating factor to his crime violates the Ex Post Facto Clause because the factor did not exist at the time of this crime. We have repeatedly rejected this claim. See Sireci v. State, 587 So.2d 450, 454 (Fla.1991), cert. denied, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992); Zeigler v. State, 580 So.2d 127 (Fla.), cert. denied, 502 U.S. 946, 112 S.Ct. 390, 116 L.Ed.2d 340 (1991); Combs v. State, 403 So.2d 418, 421 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (Fla.1982).

[9] Next, Foster claims that the jury charge and the prosecutor's closing argument limited the jury's consideration of mitigating evidence in violation of Cheshire v. State, 568 So.2d 908 (Fla.1990) (state may not restrict consideration of mitigating circumstances solely to "extreme" emotional disturbances; any emotional disturbance relevant to the crime must be considered). The court gave the following special instruction:

> Among the mitigating circumstances which you may consider are the following. First, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
> Second, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
> Third, that the defendant had an abusive family background.
> Fourth, the defendant's poverty.
> Fifth, the physical illness of the defendant.
> Sixth, the defendant's love for and love by his family.
> Seventh, any alcohol or drug addiction of the defendant.
> Eighth, a troubled personal life including depression and frustration.
> Ninth, physical injuries suffered by the defendant.
> Tenth, the defendant's lack of childhood development.
> Eleventh, the effect of death of loved ones on the defendant.
> Twelfth, the learning disability suffered by the defendant.
> Thirteenth, the defendant's potential for positive sustained human relationships.
> Fourteenth, any other aspect of the defendant's character or record and any other circumstance of the crime or offense.

Foster argues that this instruction created a substantial risk that the jury believed that they could only find the mental health evidence to be mitigating if it rose to the statutory level. In addition to being given the quoted instruction, the jury was informed that it must consider any aspect of ***462** the defendant's character and background or any other circumstance presented in mitigation and that there was no limitation on the mitigating factors which could be considered. Viewing the instructions as a whole, we find no reasonable likelihood that the jurors understood the instruction to preclude them from considering any relevant evidence. Robinson v. State, 574 So.2d 108, 111 (Fla.), cert. denied, 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991). Further, in closing argument, defense counsel discussed the mental health mitigation in detail. He argued that the evidence rose to the statutory level but nevertheless argued that Foster was clearly under an emotional disturbance even if it did not meet the level required by statute. Accordingly, we reject this claim.

Next, Foster asserts that the court erred in refusing to give certain jury instructions. The rejected instructions deal with the following subjects: (1) the determination of the aggravating factor of especially, heinous, atrocious, or cruel; (2) the determination of the aggravating factor of cold, calculated, and premeditated; and (3) the jury's pardon power. He also alleges that the jury instructions on these two

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aggravating circumstances were inadequate.

[10] The instruction given on heinous, atrocious, and cruel was the same as the one held to be inadequate in Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Therefore, the court erred in failing to give Foster's requested instruction which contained an expanded definition of that aggravating factor. We conclude, however, that the error was harmless. As may be seen from that portion of the trial judge's order previously quoted, Foster's killing of Julian Lanier was especially heinous, atrocious, and cruel by any standard. The jury could not have been misled by the inadequate instruction. We further hold that the court did not abuse its discretion in refusing to give the other jury instructions which Foster had requested.

[11] Next, Foster asserts that the court erred in failing to strike three venire members for cause. He argues that: (1) Carol Ann Pope should have been excused because she indicated bias against persons who have had numerous appeals; (2) Thomas Martin should have been excused because he went to junior high school with Foster and the two of them "had a couple of fights"; (3) Marion Pelland should have been excused because she was predisposed toward imposing the death penalty for all premeditated murders. Foster exercised peremptory challenges to excuse these three jurors.

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, 446 So.2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). The record does not support Foster's allegations regarding these potential jurors. We have reviewed the transcript of jury selection and do not find any basis for excusing these jurors for cause.

Next, Foster claims that the trial court improperly excused venire member Deluzain for cause in violation of the principles established in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

[12] A juror may be excluded in a death case if his views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). The record evinces Deluzain's inability to set aside her own beliefs in deference to the law. Randolph v. State, 562 So.2d 331, 337 (Fla.), cert. denied, 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990). She said that she did not believe that she could vote to impose the death penalty in any situation other than a murder within a prison setting. When asked whether she could set aside her feelings against the death penalty if the murder were sufficiently aggravated, she responded that she was not sure that ***463** she could. The trial court did not abuse its discretion in excusing her for cause.

[13] Further, Foster challenges the circuit court's refusal to allow him to show that the use of the death penalty in Bay County, Florida, is racially discriminatory. Foster moved to preclude the state attorney's office from seeking the death penalty in his case based on his assertion that the Bay County State Attorney's Office pursued prosecution much more vigorously and fully in cases involving white victims than in cases involving black victims.

In support of his claim, Foster proffered a study conducted by his counsel of some of the murder/homicide cases prosecuted by the Bay County State Attorney's Office from 1975 to 1987. Analyzing the raw numbers collected, Foster concluded that defendants whose victims were white were 4 times more likely to be charged with first-degree murder than defendants whose victims were black. Of those defendants charged with first-degree murder, white-victim defendants were 6 times more likely to go to trial. Of those defendants who went to trial, white-victim defendants were 26 times more likely to be convicted of first-degree murder. The court refused to hold an evidentiary hearing, finding that the alleged facts did not make out a prima facie claim of discrimination.

The United States Supreme Court rejected a similar challenge in McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). McCleskey claimed that the imposition of Georgia's death penalty was racially discriminatory in violation of the Eighth and Fourteenth Amendments. He relied on a statistical study, the Baldus study, which purported to show a disparity in the imposition of Georgia's death penalty based on the race of the victim and the race of the defendant. The raw figures collected by Professor Baldus indicated that defendants charged with killing white victims received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases.

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Baldus further found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; and 3% of cases involving white defendants and black victims. The figures indicated that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.

After accounting for numerous variables that could have explained the disparities on other than racial grounds, the Baldus study found that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing black victims. Black defendants were 1.1 times as likely to receive a death sentence as other defendants. As a black defendant who killed a white victim, McCleskey argued that the Baldus study demonstrated that he was discriminated against because of his race and the race of his victim.

The Court held that McCleskey "must prove that the decisionmakers in his case acted with discriminatory purpose." McCleskey, 481 U.S. at 292, 107 S.Ct. at 1767. The Court rejected McCleskey's claim because he offered no evidence specific to his own case to support an inference that racial considerations played a part in his sentence. The Court found the Baldus study to be insufficient to support an inference that the decisionmakers in McCleskey's case acted with purposeful discrimination.

Foster's claim suffers from the same defect. He has offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in his case. See Harris v. Pulley, 885 F.2d 1354, 1375 (9th Cir.1988), cert. denied, 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed.2d 848 (1990); Byrd v. Armontrout, 880 F.2d 1, 10 (8th Cir.1989), cert. denied, 494 U.S. 1019, 110 S.Ct. 1326, 108 L.Ed.2d 501 (1990); Kelly v. Lynaugh, 862 F.2d 1126, 1135 (5th Cir.1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d ***464** 608 (1989). The trial court was not required to hold an evidentiary hearing on this claim. Harris, 885 F.2d at 1375 (defendant not entitled to evidentiary hearing where he offered no proof that decisionmakers in his case acted with discriminatory purpose).

Foster argues that McCleskey does not foreclose his challenge because his evidence focuses solely on the practices of one prosecutor's office, whereas the Baldus study consisted of generalized statistics covering every aspect of Georgia's death penalty scheme. The McCleskey Court questioned whether a state "policy" of discrimination could be deduced by studying the combined effects of hundreds of decisionmakers.

The Court in McCleskey held that:

> [T]he policy considerations behind a prosecutor's traditionally "wide discretion" suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties "often years after they were made." Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.
>
> .... Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.

McCleskey, 481 U.S. at 296-97, 107 S.Ct. at 1769-70 (citations omitted).

The figures proffered by Foster do not constitute "exceptionally clear proof" of discrimination. See Harris v. Pulley, 885 F.2d at 1375. Foster's figures do not account for any of the myriad of nonracial variables that could explain the disparity. See McCleskey, 481 U.S. at 295, n. 15, 107 S.Ct. at 1769, n. 15 ("decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations...."). Even assuming the validity of Foster's study, [FN8] the raw numbers analyzed by Foster do not show a significantly greater disparity than figures proffered by the Baldus study which had taken into account numerous nonracial variables. [FN9]

> FN8. The weight to be given to the results of such a small statistical sample as this is questionable. See McCleskey, 481 U.S. at 295, n. 15, 107 S.Ct. at 1768, n. 15.
>
> FN9. The figures indicating that of the defendants who went to trial, white-victim defendants were 26 times more likely to be convicted of first- degree murder than were black-victim defendants cannot be attributed to a decision by the Bay County State Attorney's

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Office and thus are not relevant here.

[14] Finally, Foster claims that the trial court's sentencing order fails to evaluate the proposed mitigating factors as required by Rogers v. State, 511 So.2d 526 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). In discussing the manner in which the trial court should consider mitigating circumstances in a case in which the state seeks the death penalty, we said:

> [T]he trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. at 534.

In addressing mitigation in the sentencing order, the trial court first listed thirteen mitigating factors that Foster had offered for consideration. The court then stated:

> *465 The Court must note that there is a conflict in evidence on the questions of whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was substantially impaired (emphasis supplied).

After discussing the conflict in the evidence, the court then concluded:

> The Court will therefore consider this conflict in the weight to be given these two factors in relating to the aggravating circumstances.
>
> The Court has considered the evidence presented in support of each of these mitigating factors and, in weighing these factors against the aggravating factors, finds that the aggravating circumstances outweigh the mitigating circumstances in this case.

While it is evident that the court considered the mitigating circumstances, we cannot tell whether the court determined whether either of the two statutory mental mitigating circumstances existed. In fact, we are unable to say whether the court found any of the mitigating circumstances to exist or what weight was given to them. Unlike Rogers, we cannot say that this defect in the sentencing order was harmless error. [FN10]

> FN10. In view of our disposition of this issue, we do not address Foster's argument with respect to proportionality.

Accordingly, we vacate the sentence of death and remand the case for the trial judge to enter a new sentencing order following the dictates of Rogers and Campbell v. State, 571 So.2d 415 (Fla.1990). [FN11] See Lucas v. State, 568 So.2d 18 (Fla.1990). We affirm the denial of Foster's motion for postconviction relief.

> FN11. While Campbell did not become final until after the original sentencing order was entered, its additional requirements will obviously be applicable to any new sentencing order.

It is so ordered.

OVERTON, McDONALD, GRIMES and HARDING, JJ., concur.

BARKETT, C.J., concurs in part and dissents in part with an opinion, in which SHAW and KOGAN, JJ., concur.

KOGAN, J., concurs in part and dissents in part with an opinion.

BARKETT, Chief Justice, concurring in part, dissenting in part.

I concur in the majority's resolution of all the issues except for Foster's claim regarding the discriminatory use of the death penalty in Bay County, Florida.

The majority concludes that Foster "has offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in his case." Majority op. at 463. My disagreement is not so much with that statement as with a standard that requires showing something that is virtually impossible to show: purposeful discrimination. McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

In McCleskey, the U.S. Supreme Court dismissed McCleskey's analogous federal equal protection claims, holding that a defendant must establish both

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"the existence of purposeful discrimination" and a "discriminatory effect" on that particular defendant. Id. at 292, 107 S.Ct. at 1767. I agree that under the federal precedent McCleskey would control this case.

Foster, however, claims a violation of the Equal Protection Clause of the Florida Constitution. Art. I, § 2, Fla.Const. Despite the principles adopted in Traylor v. State, 596 So.2d 957 (Fla.1992), establishing the primacy of the Florida Constitution, the majority completely ignores Foster's state constitutional challenge. I believe that Foster's claim deserves full consideration.

Despite earlier transgressions, [FN12] Florida in recent years has clearly established its *466 commitment to equality of treatment in the courts. See, e.g., Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission (1990 & 1991); The Florida Supreme Court Gender Bias Study Commission Final Report (1990). Indeed, while the U.S. Supreme Court was still requiring a defendant to meet the impossible burden of proving that discriminatory jury selection practices were employed systematically in a number of similar cases or contexts, Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), this Court took the lead in State v. Neil, 457 So.2d 481 (Fla.1984), clarified by State v. Castillo, 486 So.2d 565 (1986), and established guidelines under the Florida Constitution to guard against the racially discriminatory use of peremptory challenges. [FN13] The U.S. Supreme Court followed suit two years later in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), when it overruled the Swain standard and acknowledged that it imposed a "crippling burden of proof" that rendered a prosecutor's peremptory challenges largely immune from constitutional scrutiny. Id. at 92-93, 106 S.Ct. at 1720-21. The Court found that a prosecutor's use of peremptory challenges is subject to the constraints of the Equal Protection Clause when there is some basis for believing that the challenges are used in a racially discriminatory manner. [FN14]

> FN12. See, e.g., State ex rel. Hawkins v. Board of Control, 93 So.2d 354 (Fla.), cert. denied, 355 U.S. 839, 78 S.Ct. 20, 2 L.Ed.2d 49 (1957); State ex rel. Hawkins v. Board of Control, 83 So.2d 20 (Fla.1955), cert. denied, 350 U.S. 413, 76 S.Ct. 464, 100 L.Ed. 486 (1956).
>
> FN13. See also State v. Slappy, 522 So.2d 18 (Fla.), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988) (holding that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor).
>
> FN14. The U.S. Supreme Court recently held that the Equal Protection Clause also prohibits a criminal defendant from engaging in purposeful discrimination on the basis of race in the exercise of peremptory challenges. Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). This Court held in Neil that both the State and the defense may challenge the allegedly improper use of peremptories. 457 So.2d at 487.

The U.S. Supreme Court in Batson recognized the invidious nature of discrimination. Id. at 93-96, 106 S.Ct. at 1721-23. Justice Marshall, in a concurring opinion, noted that discrimination is not often blatantly expressed, and in many cases it is subliminal:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

Id. at 106, 106 S.Ct. at 1728 (Marshall, J., concurring). Studies of unconscious racism have shown that the perpetrator does not feel particularly punitive toward minorities; rather, he or she wants to remain distant and is less likely to feel empathy because of the distance. Sheri Lynn Johnson, Comment, Unconscious Racism and the Criminal Law, 73 Cornell L.Rev. 1016, 1020 n. 27 (1988). While society has largely rejected blatant stereotypes and overt discrimination, more subtle forms of racism are increasing: "A burgeoning literature documents the rise of the 'aversive' racist, a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously." Id. at 1027-28 (footnotes omitted).

Discrimination, whether conscious or unconscious, cannot be permitted in Florida courts. As important as it is to ensure a jury selection process free from racial discrimination, it is infinitely more important to ensure that the State is not imposing the ultimate penalty of death in a racially discriminatory manner. The U.S. Supreme Court may eventually recognize that the burden imposed by McCleskey is as insurmountable as that presented by Swain. In the meantime, defendants such as Foster have no chance of proving that application of the death penalty in a particular jurisdiction is racially discriminatory, no matter how convincing their evidence. [FN15]

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FN15. In this case, Foster presented statistical evidence showing that even though blacks constituted 40% of the murder victims in Bay County cases between 1975 and 1987, all 17 death sentences that were imposed were for homicides involving white victims. Additionally, the study produced by Foster concluded that defendants whose victims were white were four times more likely to be charged with first-degree murder than defendants whose victims were black. Of those defendants charged with first-degree murder, white-victim defendants were six times more likely to go to trial, and of those defendants who went to trial, white-victim defendants were 26 more times likely to be convicted of first-degree murder. Other studies also suggest that discrimination may be resulting in harsher penalties for those who kill whites. See, e.g., Bob Levenson & Debbie Salamone, Prosecutors See Death Penalty in Black and White, The Orlando Sentinel, May 24, 1992, at A1 (analyzing 283 first-degree murder cases prosecuted from Jan. 1, 1986, through Sept. 30, 1991, in Orange, Osceola, Seminole, Brevard, Lake, and Volusia counties, and finding that prosecutors sought the death penalty 27% of the time when white victims were involved and only 14% of the time when minority victims were involved).

*467 Assuming, for the sake of argument, that unconscious discrimination exists, how can it be proven? As the U.S. Supreme Court recognized in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977), "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." In cases involving jury pools, for example, the U.S. Supreme Court has recognized that a strict application of the purposeful discrimination standard generally required under the Equal Protection Clause is inequitable. See Washington v. Davis, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976) (explaining the standard applicable to jury cases); Castaneda v. Partida, 430 U.S. 482, 493-96, 97 S.Ct. 1272, 1279-81, 51 L.Ed.2d 498 (1977). A prima facie case of intentional discrimination can be established by showing that representation of a minority in the jury venire falls below the population as a whole or by demonstrating that criteria are subjective and lead to exclusion or underinclusion. Once the prima facie case has been established, the burden then shifts to the State to rebut that case. Partida, 430 U.S. at 494-97, 97 S.Ct. at 1280-82; see also Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970). This standard amounts to something considerably less than purposeful and deliberate discrimination; indeed, the Court in these cases has expressed a willingness to consider discriminatory impact, as evidenced by statistics, that cannot be traced to blatant or overt discrimination.

I believe that statistical evidence of discrimination in capital sentencing decisions should similarly establish a violation of article I, section 2 of the Florida Constitution. "Statistical" evidence should be construed broadly to include not only historical analysis of the disposition of first-degree murder cases in a particular jurisdiction, but also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims, and the general conduct of a state attorney's office, including hiring practices and the use of racial epithets and jokes. When racial bias, whether conscious or unconscious, exists in an environment where decisions about seeking the death penalty are made, all aspects of that bias should be available for evaluation by a court in reviewing evidence of discrimination.

In crafting a standard for proving racial discrimination in death penalty decisionmaking under the Florida Constitution, it is appropriate to borrow from the Neil and Slappy peremptory challenge line of cases, which gives the trial court discretion to determine whether a prima facie case has been established. See, e.g., Neil; Slappy; Wright v. State, 586 So.2d 1024, 1027-28 (Fla.1991); Reed v. State, 560 So.2d 203, 206 (Fla.), cert. denied, 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990). As in the area of peremptory challenges, a bright line test for determining whether racial discrimination in the decision to seek the death penalty has occurred would be counterproductive. See Slappy, 522 So.2d at 21-22. Racial discrimination in the capital sentencing process should be evaluated as a whole, and it is impossible to anticipate all of the circumstances in which it might be manifested. The trial court is in the best position to evaluate whether a party *468 has demonstrated sufficient evidence of discrimination to warrant an inquiry.

I suggest the following standard: A party asserting racial discrimination in the State's decision to seek the death penalty should make a timely objection and demonstrate on the record that the discrimination exists and that there is a strong likelihood it has influenced the State to seek the death penalty. Such discrimination conceivably could be based on the race

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of the victim or on the race of the defendant. Once the trial court determines that the initial burden has been met by the defendant, the burden then shifts to the State to show that the practices in question are not racially motivated. If the trial court determines that the State does not meet that burden, the State then is prohibited from seeking the death penalty in that case.

Accordingly, because the majority has applied a federal constitutional standard in Foster's case that is impossible to meet and has missed the opportunity to craft a state constitutional standard such as that discussed above, I dissent from that portion of the opinion.

SHAW and KOGAN, JJ., concur.

KOGAN, Justice, concurring in part and dissenting in part.

I concur in the opinion of Chief Justice Barkett with the exception that I do not believe the aggravating factor of cold, calculated premeditation was proved beyond a reasonable doubt.

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IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

STATE OF FLORIDA CASE NO: 75-486-C

CHARGE: FIRST DEGREE MURDER
ROBBERY

vs

CHARLES KENNETH FOSTER,

DEFENDANT

AMENDED MOTION FOR POST CONVICTION RELIEF
FLORIDA RULE OF CRIMINAL PROCEDURE 3.850

1. Name and location of the court that entered the judgment of conviction under attack:

Circuit Court Of the Fourteenth Judicial Circuit, Bay County, Florida.

2. Date of judgment of conviction: August 12, 1993. Florida Supreme Court Affirmed, June 16, 1995. Original conviction October 4, 1975.

3. Length of sentence: Death

4. Nature of offenses involved:

1. First Degree Murder

2. Robbery

5. What was your plea? Not Guilty

MAGNITUDE IN SENTENCING MR. FOSTER TO DEATH, IN VIOLATION OF JOHNSON V MISSISSIPPI, 108 S. CT. 1981 (1988) AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM XXX

MR. FOSTER'S DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD

(3) Did you receive any evidentiary hearing on your petition, application, motion, etc.?

No

(4) Result: Pending

12. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgement in any other court? Yes

13. If your answer to number 12 was "Yes" give the following information:

(a)(1) Name of court: U.S. Supreme Court; U.S. Court of Appeals Eleventh Circuit; U.S. Dirstrict Court.

(2) Nature of the proceeding: Petition for Certiorari; Habeas Corpus & Appeals.

(3) Grounds raised: (See Composite Exhibit A).

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc?

No

14. Grounds on which Judgment and Sentence is unlawful.

A. GROUND I CONSTITUTIONALLY FLAWED HARMLESS ERROR ANALYSIS

The Florida Supreme Court in its 1995 affirmance of Defendant's Death Sentence found that although the Cold, Calculated, Premeditated was invalid under Jackson v. State, 19 FLW S 215 (Fla. 1994) it was "harmless error." Defendant submits that the Florida Supreme Court did not conduct a meaningful or constitutionally correct harmless error analysis. The law clearly states that the standard for harmless error analysis requires the State to establish "beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given."

Defendant submits that the State's burden of proof cannot be determined by the Florida Supreme Court without the State going forward with an evidentiary hearing. For the Court to conclude that a jury's recommendation would have been the same (here, an 8-4 vote for death), involves a constitutionally flawed reasoning process. There is no way to determine what a jury relied upon or would have ruled with a correct jury instruction and it is pure speculation to state otherwise. If four jurors voted for life without the instruction what is to say that the other eight (or two of them) may have voted life with the proper instruction? When the Court engages in a harmless error analysis in a death case it oversteps due process boundaries of the Constitution of the United States and the Constitution of the State of Florida.

Accordingly, a harmless error analysis in a death penalty case violates the Due Process provisions of Fifth and Fourteenth Amendments to the United States Constitution, the Sixth Amendment right to an impartial jury, and Article I, § 9 and § 16 of the Florida Constitution.

The harmless error analysis also violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as well as Article I, § 2 of the Florida Constitution.

Defendant Foster, after a flawed instruction, is destined for death while other Florida Defendants may be given life sentences after a proper instruction.

B. GROUND II VIOLATION OF RIGHT TO IMPARTIAL JURY

Defendant's right to an impartial jury under the Sixth and Fourteenth Amendment to the United States Constitution and Art I, § 16 of the Florida Constitution was violated by the Prosecutor's participation in the "venire pre-selection" process in Bay County. The prosecutor engaged in conduct that systematically excused jurors called for the venire prior to their random selection for service on the jury panel called to serve on Defendant's case.

A copy of the prosecutor's venire list and excuses is attached hereto as Composite Exhibit B.

Said participation by the State in the venire excuse process violates Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 9 of the Florida Constitution.

The jury selection process is also flawed under the Sixth and Fourteenth Amendments to the United States Constitution right to an impartial jury and the corresponding right to an impartial jury under Art I, § 16 of the Florida Constitution.

Defendant was tried by a petit jury which was not a fair cross-section of the community, resulting in unconstitutional systematic exclusion of a significant portion of the population from the jury pool. This deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as the corresponding portions of the Florida Constitution.

Defendant submits that he has standing to raise the issue of jury selection in his case.

the individual response, the Assistant State Attorney would object to disqualification for some venire members and not object to the release of others. The Court would then decide if the juror should be disqualified after considering the venire member's response and the State's position. No transcript or questionnaires exist, except Exhibit B, to record the reason for disqualifying. No record exists to show the race, ethnicity, social class, income level, religion of the venire members released or retained. Appellate counsel could not challenge this procedure without a transcript. Defendant was denied the opportunity to challenge the venire under Rule 3.290 of the Florida Rules of Criminal Procedure. Even more damaging to Defendant's right to a fair trial is that, while he and his counsel were excluded from the part of the jury selection, the prosecutor was present.

No record was made of this critical stage of jury selection except that located through public records disclosure by current counsel's investigator Michael Glantz. Furthermore, all documentation, except Exhibit B, relating to the jury pool was destroyed before Defendants conviction became final, thus rendering such records unavailable to counsel. To the extent trial counsel failed to discover and litigate this issue, Defendant was denied effective assistance of counsel. An evidentiary hearing is warranted because the records and files do not conclusively show that Defendant is not entitled to relief.

Prejudice is evident from any method which culls or removes prospective jurors, particularly based upon gender, from the panel which is called for jury duty during Defendant's trial week. The Court's (ex parte) exercising of practice of excusing jurors is the legal equivalent to contacting the jury outside the presence of counsel. Such activity amounts to a denial of an impartial jury panel because the selection process is no longer random. Ex parte challenge or

D. GROUND IV DEFENDANT'S CONFINEMENT ON DEATH ROW FOR TWENTY THREE (23) YEARS CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

Defendant was originally sentenced to death on October 4, 1975. He has been on Death Row for nearly twenty-four (24) years. His death sentences have been the subject of many post-conviction and appellate endeavors which were largely successful in obtaining post-conviction relief and particularly a penalty phase retrial in 1993. Furthermore, he has survived two death warrants. Mr. Foster came within 15 hours of execution in 1984. In 1981 he came within three days of execution.

His appeal of his last death sentence was affirmed on June 16, 1995. He was essentially without conflict-free counsel until 1998.

Defendant submits that his 23 years on Death Row, except for various remands for post-conviction hearings, constitutes cruel and unusual punishment contrary tc the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution.

A sentence of death is said to subject the recipient to "the uncertainty of the whole of it." It's deterrent effect is also minimal after 23 years. A psychological report by Dr. Michael Rappaport is attached hereto as Exhibit E reflecting Mr. Foster's mental state.

The deterrent value of incarceration for 23 years might be comparable to death itself and "... its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes."

Mr. Foster's sentence of death violates the Eighth and Fourteenth Amendments of the Constitution of the United States and Article 1, § 9 and § 17 of the Florida Constitution.

E. GROUND V CRUEL AND UNUSUAL PUNISHMENT

(1) Mr. Foster is innocent of the death penalty. Mr. Foster was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, § 9 and § 17 of the Florida Constitution.

(2) Mr. Foster was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution and under Article I, § 9 and § 17 of the Florida Constitution because execution by electrocution is cruel and/or unusual.

(3) The death penalty by electrocution as well as the death penalty as a concept is cruel and unusual punishment in the State of Florida. Florida leads the nation in individuals who were wrongfully sentenced to death. A recent article in the St. Petersburg Times depicted twenty people who had been wrongfully sentenced to death. Three of these people came within sixteen hours of electrocution. Sydney P. Freedberg, "Freed from death row" St. Petersburg Times (July 4, 1999). (Composite Exhibit F). The likelihood that an innocent human being could actually be executed or even come within days or hours of execution renders the death by electrocution as well as the death penalty in Florida cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, § 17 of the Florida Constitution.

(4) Furthermore, execution by electrocution is cruel and/or unusual in the State of Florida in view of the recent execution of Allen Davis wherein excess blood poured from Mr. Davis and he took gasps of air as his death sentence was being imposed.

F. GROUND VI BRADY RULE VIOLATION

IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,
APPELLANT

CASE NO.: SC01-240
LOWER TRIBUNAL NO.: 75-486

VS.

STATE OF FLORIDA,
APPELLEE

INITIAL BRIEF OF APPELLANT

APPEAL FROM DENIAL OF 3.850 MOTION FOR POST-CONVICTION RELIEF WITHOUT EVIDENTIARY HEARING

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ISSUE I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850 MOTION FOR POST CONVICTION RELIEF WITHOUT A HEARING BASED UPON HIS ALLEGED VIOLATION OF HIS RIGHT TO AN IMPARTIAL JURY (CONTRARY TO THE V, VI AND XIV AMENDMENTS UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 CONSTITUTION OF THE STATE OF FLORIDA)

(STANDARD OF REVIEW – INDEPENDENT STANDARD—3.850 ALLEGATIONS NOT CONCLUSIVELY REBUTTED BY THE RECORD)

De novo

Failure of the trial court to permit an evidentiary hearing on this issue is reversible error. The amended 3.850 motion sufficiently alleges that the state's jury notes were not available until the public records review of the state's files by conflict counsel's investigator. (PC 12-15) Those notes revealed a systematic exclusion of pregnant women or women with young children.

The statute in effect at Defendant Foster's trial was declared unconstitutional in Alachua County Court Executive v. Anthony, 418 So. 2d 264 (Fla. 1982). In denying Defendant's amended 3.850, Judge Sirmons concluded that the Alachua case addressed "equal protection" issues and therefore did not … "compromise the integrity of the jury." (PC 96) Alachua very clearly declares the statute under

ISSUE IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850 MOTION CLAIMS D. CRUEL AND UNUSUAL PUNISHMEN—23 YEARS ON DEATH ROW, AND E. CRUEL AND UNUSUAL PUNISHMENT—ELECTRIC CHAIR (CONTRARY TO THE V, VIII AND XIV AMENDMENTS UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 17 CONSTITUTION OF THE STATE OF FLORIDA)

The Florida Supreme Court has previously ruled against these claims. These issues are submitted to the Florida Supreme Court for re-consideration and possible future United States Constitutional review.

In Knight v. State, 746 So.2d 423 (Fla. 1999) the Florida Supreme Court held:

> Finally, Knight claims that to execute him after he has already endured more than two decades on **death row** is unconstitutionally **cruel** and **unusual** punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on **death row** constitutes **cruel** and **unusual** punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson,* 79 F.3d 432 (5th Cir.1996); *State v. Smith,* 280 Mont. 158, 931 P.2d 1272 (1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See State v. Schackart,* 190 Ariz. 238, 947 P.2d

ISSUE V

WHETHER THE SUPREME COURT ENGAGED IN A CONSTITUTIONALLY FLAWED HARMLESS ERROR ANALYSIS IN THE DEFENDANT'S LAST APPEAL. FOSTER V. STATE, 654 So.2d 112 (Fla. 1995)

(CONTRARY TO THE V AND VI AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 9, CONSTITUTION OF THE STATE OF FLORIDA)

This issue included in Defendant's 3.850 Motion is more appropriately addressed in his Petition for habeas corpus proceeding filed herewith. However, Defendant requests this court revisit and reconsider this issue because of its interrelation with Issue Number III—Double Jeopardy violation, and the felony murder aggravator. If there is legally no evidence of a robbery or felony-murder, then the cold, calculated, premeditated aggravator was misapplied under the harmless error standard and the unconstitutionally applied cold, calculated, premeditated instruction.

If defendant's case had been submitted to a jury without the robbery aggravator and with an appropriate cold, calculated, premeditated instruction, the eight to four death recommendation would likely be favorably different. Likewise, the sentencing judge would be more apt to impose a life sentence without the robbery aggravator.

Supreme Court of Florida

No. SC01-240

CHARLES KENNETH FOSTER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC01-767

CHARLES KENNETH FOSTER,
Petitioner,

vs.

MICHAEL W. MOORE, etc., et al.,
Respondents.
[February 14, 2002]

PER CURIAM.

Charles Kenneth Foster, a prisoner under the sentence of death, appeals an

each fall into one of three categories: procedurally barred, without merit, or conclusively refuted by the record.

RIGHT TO AN IMPARTIAL JURY

Foster claims the trial court erred by summarily denying the claim that his right to have an impartial jury was violated because a fair cross-section of the community was not available to serve on his jury due to the trial judge excusing a certain class of prospective jurors. Specifically, Foster alleges for the first time in this 3.850 motion that pregnant women and women with small children were automatically excused from the jury venire before voir dire began, pursuant to a flawed statutory exemption scheme. Foster bases this allegation on the fact that the State's jury notes, which allegedly were not previously available to him, do not affirmatively indicate that potential jurors were not excused. Foster states that if the trial court automatically excused this class of people, it did so improperly because the statute provided, "[E]xpectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty." § 40.01(1), Fla. Stat. (1975) (emphasis added). Foster claims that he was entitled to an evidentiary hearing to explore whether or not jurors were improperly excused.

We find this claim is procedurally barred because Foster's challenge to the

and litigate this issue, Defendant was denied effective assistance of counsel." Foster has simply failed to allege specific facts that, when considering the totality of the circumstances, demonstrate a deficiency on the part of counsel which resulted in prejudice to the defendant. Furthermore, Foster has not demonstrated that he was constitutionally entitled to have pregnant women and women with small children serve on his jury since section 40.01(1), Florida Statutes (1975), provided them with an excuse for service and this Court has upheld the statute in the face of constitutional concerns. See McArthur v. State, 351 So. 2d 972, 975 (Fla. 1977). Therefore, we find the trial court did not err by denying Foster an evidentiary hearing on this claim.

BRADY CLAIM

Foster alleges the trial court erred by not holding a hearing on his claim that the State withheld exculpatory evidence from him in violation of Brady v. Maryland, 373 U.S. 83 (1963).[6] Specifically, Foster alleges the State did not disclose (until a public records request), a letter from jail physician Dr. Russell

---

6. We have held there are three components that a defendant must show in order to be successful in a Brady claim: (1) the evidence must be favorable to the defendant because it is either exculpatory or because it is impeaching; (2) the evidence must have been withheld by the State, either willfully or inadvertently; and (3) prejudice to the defendant must have ensued. See State v. Riechmann, 777 So. 2d 342, 362 (Fla. 2000).

Stewart to Sheriff Tullis Easterling dated July 31, 1975, in which Dr. Stewart observed "obvious mental disturbance" in Foster during an examination before trial. However, the record affirmatively and conclusively refutes Foster's claim that the letter was withheld by the State, either willfully or inadvertently, because the record reflects that defense counsel was in possession of this letter on June 6, 1990, during Foster's resentencing hearing. Defense counsel moved to have the letter entered into evidence and the court admitted it as defense exhibit number 4 during the penalty phase of Foster's resentencing hearing. We therefore affirm the trial court's summary denial of this claim because Foster's Brady claim is conclusively refuted by the record.

DOUBLE JEOPARDY VIOLATION

Foster alleges the trial court erred by summarily denying his claim that the jury's two murder verdicts, finding him guilty of separate counts of premeditated murder and felony murder for a single death, violate double jeopardy principles. We find the jury's dual verdict is supported by the evidence in this case, and, as we stated in Lamb v. State, 532 So. 2d 1051, 1052 (Fla. 1988), "there is no reason why a defendant cannot premeditate a murder committed during the course of a felony." We hereby affirm the trial court's summary denial of this claim because the record reflects that the trial court properly adjudicated Foster guilty of a single

murder conviction for first-degree murder, which conclusively refutes Foster's double jeopardy claim. See id. Of course, Foster also received a single sentence for the murder.

CRUEL AND UNUSUAL PUNISHMENT

Foster argues the trial court erred when it summarily denied his claim that the twenty-three years he has spent on death row constitutes cruel and unusual punishment. We have previously held an extended stay on death row does not constitute cruel and unusual punishment. See Knight v. State, 746 So. 2d 423, 437 (Fla. 1998). We also reject Foster's claim that the death penalty is per se cruel and unusual punishment, an issue that we have already decided adversely to him. See Davis v. State, 742 So. 2d 233, 235-36 (Fla. 1999) (holding that the claim that the death penalty is basically cruel and unusual punishment is without merit). Therefore, we affirm the trial court's summary denial of this claim, as we find that it is without merit.

HARMLESS ERROR ANALYSIS

Foster alleges this Court engaged in a constitutionally flawed harmless error analysis regarding our conclusion in Foster v. State, 654 So. 2d 112, 115 (Fla. 1995), in which we stated that because the trial court found no statutory mitigators and three strong aggravators, the giving of an erroneous cold, calculated, and

premeditated aggravator instruction did not affect the jury's consideration of his sentence, and therefore the giving of such instruction was harmless error. A postconviction motion is not the proper vehicle to challenge a decision of this Court. Rule 3.850 motions are a vehicle provided to challenge collateral issues related to the trial court proceedings, not appellate decisions. See Fla. R. Crim. P. 3.850(a)(1)-(6). Further, this claim is procedurally barred because it is an improper relitigation of an issue upon which this Court has already ruled. See Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992). We therefore affirm the trial court's summary denial of this claim.

HABEAS CORPUS

Foster alleges both appellate counsel and postconviction counsel were ineffective for not sufficiently arguing that the trial court erred when it stated that aggravators were established beyond a reasonable doubt, without a specific factual analysis that a robbery was committed. The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus and we consider it here. See Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). However, this Court has held that ineffective assistance of postconviction counsel is not a cognizable claim. See Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001) (citing State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 408 (Fla. 1998),

IN THE
SUPREME COURT OF THE UNITED STATES
NO: _____

CHARLES KENNETH FOSTER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Petition for Writ of Certiorari and Appendix have been served by U.S. Mail upon MICHAEL MOORE, SECRETARY, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500; the Office of the Attorney General, Attention: RICHARD MARTELL, ASST ATTORNEY GENERAL, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050; and The Office of the State Attorney, Bay County, Attention: ALTON PAULK, ASA, P O Box 1040, Panama City, FL 34202 this the 8th day of May, 2002.

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Supreme Court, U.S.
FILED
JUL 19 2002
CLERK

NO. 01-10868

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES KENNETH FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

CAPITAL CASE

Respondent reframes the questions presented as:

QUESTION I

WHETHER THE FLORIDA STATUTES ALLOWING EXPECTANT MOTHERS AND MOTHERS OF YOUNG CHILDREN TO BE EXEMPT FROM JURY SERVICE VIOLATED EQUAL PROTECTION?

QUESTION II

WHETHER HARMLESS ERROR ANALYSIS VIOLATES DUE PROCESS OR THE RIGHT TO A JURY TRIAL?

QUESTION III

WHETHER AN EXTENDED STAY ON DEATH ROW CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT?

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NO. 01-10868

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES KENNETH FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

OPINION BELOW

The opinion and judgment of the Florida Supreme Court sought to be reviewed in this petition is *Foster v. State*, 810 So.2d 910 (Fla. 2002).

JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. § 1257(a). The Florida Supreme Court's opinion in this case was issued on February 14, 2002. No motion for rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida's persons disqualified or excused from jury service statute, § 40.01(1), Florida Statutes (1975) provided:

> . . . expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The facts of this case are recited in *Foster v. State*, 369 So.2d 928 (Fla.1979):

> Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met defendant and the victim, Julian Lanier, at a bar. They knew defendant, but the victim was a stranger. The girls, after a discussion, agreed to go to the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The victim was quite intoxicated and surrendered the driving chore to Gail. The defendant and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.
>
> Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. Defendant then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so defendant took a knife and cut the victim's spine.
>
> The girls and defendant then drove off in the Winnebago and found the victim's wallet underneath a mattress. The defendant and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.
>
> The next morning Anita Rogers went to the Sheriff's Department and reported what had happened. She had been committed to a mental institution when she was 13 years of age and was not charged with any offense in this case.
>
> Defendant was charged by an indictment with the offenses of first-degree murder and robbery. The defendant testified and, during his description of the events of the evening, testified as follows:
>
> I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him.
>
> The jury returned verdicts finding defendant guilty of robbery, premeditated murder in the first degree, and felony murder.

Foster, 369 So.2d at 928-29 (Fla.1979).

The procedural history of this case is recited in *Foster v. State*, 810 So.2d 910 (Fla. 2002):

> Foster was convicted of the first-degree murder and robbery of Julian Lanier, and, after the jury recommended death, the trial court sentenced him to death. Foster's conviction and sentence were affirmed by the Florida Supreme Court. The Florida Supreme Court subsequently affirmed the trial court's denial of Foster's first postconviction motion, see *Foster v. State*, 400 So.2d 1 (Fla.1981), and also affirmed the trial court's denial of Foster's second postconviction motion. See *Foster v. State*, 518 So.2d 901 (Fla.1987). However, the Florida Supreme Court granted Foster's habeas petition and remanded for a new sentencing proceeding based on a *Hitchcock* error. See *id.* at 902. Foster's resentencing jury recommended death by an eight-to-four vote and the trial court imposed a death sentence. See *Foster v. State*, 614 So.2d 455, 458 (Fla.1992). In addition, pending resentencing, Foster filed a third postconviction motion, which the trial court summarily denied. See *id.* Upon review of the denial of postconviction relief and of resentencing, the Florida Supreme Court affirmed the denial of Foster's third postconviction motion, but vacated Foster's death sentence and remanded the case for the trial court to enter a new sentencing order consistent with *Rogers v. State*, 511 So.2d 526 (Fla.1987), and *Campbell v. State*, 571 So.2d 415 (Fla.1990). See *Foster*, 614 So.2d at 465.
>
> Pursuant to our remand, the trial court entered a new sentencing order, reimposing the death sentence, and this Court subsequently affirmed the sentence. See *Foster v. State*, 654 So.2d 112, 113 (Fla.1995). The trial court found three statutory aggravators: (1) the murder was committed while Foster was engaged in the commission of or attempt to commit robbery; (2) the crime was especially heinous, atrocious, or cruel; and (3) the murder was committed in a cold, calculated, and premeditated manner (CCP). See *id.* at 113-14. The trial court found fourteen nonstatutory mitigators: (1) Foster murdered Lanier while he was under the influence of emotional or mental disturbance (little weight); (2) Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired (little weight); (3) Foster has an abusive family background (very little weight); (4) Foster's poverty (very little weight); (5) Foster's physical illnesses (very little weight); (6) Foster's love for, and love by, his family (very little weight); (7) Foster's alcohol and/or drug addiction (very little weight); (8) Foster's troubled personal life (very little weight); (9) Foster's physical

injuries (very little weight); (10) Foster's lack of childhood development (very little weight); (11) Foster's struggle with the death of loved ones (very little weight); (12) Foster's learning disabilities; (13) Foster's potential for positive sustained human relationships (very little weight); and (14) Foster's remorse for the crime (very little weight). See id. at 113 n. 5.

On September 7, 1999, Foster filed his fourth 3.850 motion, which represents the first 3.850 motion filed after the trial court entered a new sentencing order pursuant to our remand citing *Campbell*. A *Huff* hearing on this motion was held on November 27, 2000. On December 29, 2000, the trial court summarily denied the motion on all grounds. Foster now appeals the trial court's summary denial of his fourth 3.850 motion, alleging that the trial court erred in denying him an evidentiary hearing, and he petitioned separately for a writ of habeas corpus.

Foster, 810 So.2d at 912-914 (footnotes omitted).

On appeal to the Florida Supreme Court, Foster raised five claims: 1) the trial court erred by denying without a hearing on his claim that his right to an impartial jury was violated; (2) the trial court erred by denying without a hearing Foster's claim that his conviction for both felony murder and premeditated murder violated double jeopardy; (3) the trial court erred by denying without a hearing Foster's *Brady* claim; (4) the trial court erred by denying without a hearing Foster's claim that the twenty-three years that Foster has spent on death row constitutes cruel and unusual punishment; and (5) the Florida Supreme Court engaged in a constitutionally flawed harmless error analysis regarding the CCP aggravator in *Foster v. State*, 654 So.2d 112 (Fla.1995). The Florida Supreme Court rejected these claims and affirmed the trial court's summary denial. *Foster*, 810 So.2d at 914.

ARGUMENT

QUESTION I

WHETHER THE FLORIDA STATUTES ALLOWING EXPECTANT MOTHERS AND MOTHERS OF YOUNG CHILDREN TO BE EXEMPT FROM JURY SERVICE VIOLATED EQUAL PROTECTION?

Foster asserts that Florida's statute excusing expectant mothers and mothers with children under 15 years of age from jury service violates equal protection. This Court lacks the authority to address this claim. The Florida Supreme Court found this claim to be procedurally barred:

Foster claims the trial court erred by summarily denying the claim that his right to have an impartial jury was violated because a fair cross-section of the community was not available to serve on his jury due to the trial judge excusing a certain class of prospective jurors. Specifically, Foster alleges for the first time in this 3.850 motion that pregnant women and women with small children were automatically excused from the jury venire before voir dire began, pursuant to a flawed statutory exemption scheme. Foster bases this allegation on the fact that the State's jury notes, which allegedly were not previously available to him, do not affirmatively indicate that potential jurors were not excused. Foster states that if the trial court automatically excused this class of people, it did so improperly because the statute provided, "[E]xpectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty." § 40.01(1), Fla. Stat. (1975) (emphasis added). Foster claims that he was entitled to an evidentiary hearing to explore whether or not jurors were improperly excused.

We find this claim is procedurally barred because Foster's challenge to the procedure in which jurors were excused was not properly preserved at the trial level. See *Hoskins v. State*, 702 So.2d 202 (Fla.1997) (holding that the defendant's challenge to the trial court's practice of having the court clerk automatically excuse prospective jurors pursuant to section 40.013(5), Florida Statutes (1995), was not timely filed because the excusals had already been made and the defendant did not challenge his jury panel). We therefore affirm the trial court's summary denial of this claim.

Foster, 810 So.2d at 914-915.[1]

A state Supreme Court's finding that a claim is procedurally barred, normally bars this Court's review the claim. *Sochor v. Florida*, 504 U.S. 527, 534 (1992)(holding this Court was without authority to address a claim that the Florida Supreme Court had found to be not preserved for appeal). In *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), this Court reaffirmed that "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." This Court has also explained that any opinion from this Court in such a situation would be purely advisory. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997)(finding lack of jurisdiction to review independently supported judgments on direct appeal and observing

[1] In a footnote the Florida Supreme Court rejected the attempt to cast this claim as newly discovered evidence:

> Foster's argument that this claim may be brought as a newly discovered evidence claim is refuted by the fact that in his own 3.850 motion, he admits he knew that the judge conducted a voir dire outside his and counsel's presence. The initial prong for determining whether something constitutes "newly discovered evidence," involves the fact that it must have been unknown by the trial court, by the party, or by counsel at the time of trial and the defendant, or his counsel could not known of it through due diligence. *See Jones v. State*, 709 So.2d 512, 521 (Fla.1998). Foster knew of the ex parte meeting with the jury venire at the time of his trial; his counsel could have attempted to discover what went on at that meeting through due diligence, and filed a timely pretrial motion. Thus, this allegation is not properly raised as one pursuant to newly discovered evidence.

Foster, 810 So.2d at 915, n.5.

that because the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory). Thus, this Court lacks authority to review a question of federal law because the state court's decision rested on state law ground that is independent of the federal question and adequate to support the judgment.

Florida's statute, as it existed at the time of trial, did not violate equal protection. The persons disqualified or excused from jury service statute, § 40.01(1), Florida Statutes (1975), provided:

> . . . expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty.

The right to a jury trial includes a right that the jury be drawn from a representative cross-section of the community without the systematic exclusion of large, distinct and identifiable segments of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)(invalidating sections of Louisiana's constitution and criminal procedure code which precluded women from serving on a jury unless they expressly requested to serve in writing). To make a prima facie case that the fair cross-section requirement has been violated, a defendant must show that: (1) the group allegedly excluded is a distinctive part of the community, (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection

process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979)(holding a Missouri statute which exempted all women from jury service unconstitutional).

No distinctive group is excluded by operation of this statute. The statute is not based on gender. For example, women without children are not exempt. Neither are mothers of children over 15 years of age. Additionally, even the classes exempted by the statute, expectant mothers and mother of young children, are not a distinctive group. Pregnancy is not an immutable characteristic; rather, it is a temporary condition. Neither is being the mother of a young child. As their children grow, these women are no longer exempt from jury service. This classification is not a "group" because all women will necessarily fall out of the group at some point in time. No woman remains pregnant or the mother of a young child. *McArthur v. State*, 351 So.2d 972, 975 (Fla.1977)(holding this statute does not infringe upon a defendant's right to a jury composed of a fair cross-section of the community and explaining that to evoke constitutional concern, the group excluded must be sufficiently distinctive and concluding that mothers of young children are not so distinctive as to evoke Sixth Amendment concerns); *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982)(holding that persons with young children do not comprise a constitutionally significant class and distinguishing Florida's statute which provided only a limited exemption for particular women from the statute at issue in *Durden*); *Johnson v. McCaughtry*, 92 F.3d 585, 593 (7th Cir.1996) (collecting cases and concluded that

"young persons" do not constitute a distinctive group under *Duren* and the systemic exclusion of them based on jury commissioner's personal view that they were not mature enough was not a Sixth Amendment violation); *Willis v. Zant*, 720 F.2d 1212 (11th Cir.1983)(establishing a test for what is a distinctive group including the following factors: (1) the existence of qualities that define a group, (2) similarity of attitudes, beliefs, or experiences, and (3) a community of interest among group members and rejecting a claim that 18 to 30 year-olds are a distinctive group);*United States v. Fletcher*, 965 F.2d 781, 782 (9th Cir. 1992)(adopting *Willis* test for determining whether a group is distinct and concluding that college students are not a distinct class because anyone may be a college student); *Aultman v. State*, 621 So.2d 353 (Ala. Crim. App. 1992)(rejecting a fair cross-section challenge based on college students and young adults because they are not distinctive group because they do not share "immutable and unchangeable characteristics"). The "group" excluded under this statute, *i.e.*, pregnant woman and mothers of children under 15 years, is not constitutionally significant.[2]

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[2] Foster argues that he is entitled to an evidentiary hearing to prove systematic exclusion rather than exclusion upon request. This claim does not require an evidentiary hearing. The statute itself established that two groups, expectant mothers and mothers of children under 15 years of age, were excluded. If the systemic exclusion of such a group is not a violation of the right to a jury trial, then exclusion upon request necessarily also is not a violation. Such a claim does not require an evidentiary hearing because regardless of the actual facts established, *i.e*, whether there was systemic exclusion or only exclusion upon request, neither violates the constitution. To establish a right to an evidentiary hearing, Foster must allege facts that, if true, would

entitle him to relief. Foster is not entitled to relief even if there was systemic exclusion. Thus, Foster is not entitled to an evidentiary hearing.

QUESTION II

WHETHER HARMLESS ERROR ANALYSIS VIOLATES DUE PROCESS OR THE RIGHT TO A JURY TRIAL?

Foster asserts any harmless error analysis violates due process and the right to a jury trial. The Florida Supreme Court found this claim to be not cognizable in post-conviction proceedings and procedurally barred by the law of the case doctrine. The Florida Supreme Court found:

> Foster alleges this Court engaged in a constitutionally flawed harmless error analysis regarding our conclusion in *Foster v. State*, 654 So.2d 112, 115 (Fla.1995), in which we stated that because the trial court found no statutory mitigators and three strong aggravators, the giving of an erroneous cold, calculated, and premeditated aggravator instruction did not affect the jury's consideration of his sentence, and therefore the giving of such instruction was harmless error. A postconviction motion is not the proper vehicle to challenge a decision of this Court. Rule 3.850 motions are a vehicle provided to challenge collateral issues related to the trial court proceedings, not appellate decisions. See Fla. R.Crim. P. 3.850(a)(1)-(6). Further, this claim is procedurally barred because it is an improper relitigation of an issue upon which this Court has already ruled. See *Brown v. State*, 596 So.2d 1026, 1028 (Fla.1992). We therefore affirm the trial court's summary denial of this claim.

Foster, 810 So.2d at 916.

A state Supreme Court's finding that a claim is not cognizable in post-conviction proceedings and is procedurally barred by the law of the case doctrine, normally bars this Court's review the claim. *Sochor v. Florida*, 504 U.S. 527, 534 (1992)(holding this Court was without authority to address a claim that the Florida Supreme Court had found to be not preserved for appeal). In *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), this Court reaffirmed that "will not review a question of federal law decided

by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." This Court has also explained that any opinion from this Court in such a situation would be purely advisory. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997)(finding lack of jurisdiction to review independently supported judgments on direct appeal and observing that because the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory). Thus, this Court lacks authority to review a question of federal law because the state court's decision rested on state law ground that is independent of the federal question and adequate to support the judgment.

Foster, for the first time in this Court, argues that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) has *sub silentio* overruled *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990).[3] While Foster

[3] This Court has held that harmless error analysis is proper in a capital case. *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)(holding that the right to jury trial is not infringed when state appellate court invalidates an aggravating factor found by jury but affirms death sentence after itself finding that the remaining valid aggravating factors outweigh mitigating evidence); *Jones v. United States*, 527 U.S. 373, 402 (1999)(concluding, in a direct appeal of a federal death penalty case, that any error in the nonstatutory aggravators of victim vulnerability and victim impact was harmless and explaining that harmless error review of a death sentence may be performed in at least two different ways: (1) an appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or (2) it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined citing *Clemons v. Mississippi*, 494 U.S. 738, 753-54 (1990)).

asserted in the Florida Supreme Court that the Florida Supreme Court conducted a flawed harmless error analysis on the cold, calculated and premeditated aggravator[4], his argument assumed the validity of *Clemons*. Foster never attacked the validity of *Clemons* in the Florida Supreme Court.[5] Foster did not assert that *Apprendi* has overruled *Clemons* in either his brief or his habeas petition in state court. Indeed, he did not cite *Apprendi* in either his brief or habeas petition. Nor did the Florida Supreme Court rule on the issue of whether *Apprendi* conflicts with *Clemons*. Foster's

[4] In Foster's direct appeal from a resentencing, *Foster v. State*, 654 So.2d 112 (Fla. 1995), the Florida Supreme Court found that the jury instruction on the cold, calculated, and premeditated aggravator was improper, based on *Jackson v. State*, 648 So.2d 85 (Fla. 1994), because the instruction did not adequately explain the difference between the premeditation required to convict for first-degree murder and the heightened premeditation required to find the CCP aggravator. However, the Florida Supreme Court found that the error was harmless. The *Foster* Court explained that the giving of an erroneous CCP instruction could be harmless, if the State establishes "beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." The *Foster* Court concluded that the error was harmless because the murder could only have been cold, calculated, and premeditated. The Florida Supreme Court found it "particularly telling" that after having concealed Lanier's body with bushes, Foster then proceeded to cut Lanier's spine with a knife when he realized that Lanier was still breathing and that Foster had "ample" time to reflect on his actions and their attendant consequences, after concealing Lanier's body and before cutting Lanier's spine, which was "compelling evidence of the heightened level of premeditation required to establish the cold, calculated, and premeditated aggravator." *Foster*, 654 So.2d at 115.

[5] His argument seems to have been that the insufficiency of the evidence of the robbery aggravator, coupled with the invalid cold, calculated and premeditated aggravator, rendered the particular harmless error analysis flawed and therefore, was a violation of due process.

Apprendi challenge to harmless error analysis was never presented to the Florida courts and therefore, the question presented in this Court was not adequately raised in the state courts.[6]

Furthermore, neither *Apprendi v. New Jersey*, 530 U.S. 466 (2000) nor *Ring v. Arizona*, 122 S.Ct 2428 (2002) have *sub silentio* overruled *Clemons*. In *Ring*, the United States Supreme Court held that the Sixth Amendment right to a jury trial applied to capital cases and requires that the factfinding necessary to sentence a defendant to death be done by a jury. The *Ring* Court reasoned that because aggravating factors operate as the functional equivalent of an element, the Sixth Amendment requires that they be found by a jury. The *Ring* Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990) because it was "irreconcilable" with *Apprendi*. The *Ring* Court limited its holding to states that allow a judge, "sitting without a jury", to impose death. The *Ring* Court noted that petitioner was not challenging the validity of *Clemons*. *Ring*, 122 S.Ct. at 2437, n.4.

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[6] This Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). The question must be put with fair precision including citing the relevant caselaw. *Adams v. Robertson*, 520 U.S. 83, 88 (1997)(finding federal question not properly presented where party cited the relevant case but cited it for entirely different argument in state court). When a party is arguing that a case has overruled established precedent *sub silentio*, that party must cite that case. Otherwise, the state court will merely follow the established precedent. If the party has not cited the particular case and the state court follows the established precedent, the state court cannot fairly said to have be presented with the issue. Where the issue in the federal petition was not properly presented in state court, the case is not appropriate for certiorari review.

Even in the wake of *Ring*, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. *Ring* is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. *Ring*, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge); *Ring*, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)(observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). So, once a jury has found one aggravator, the constitution is satisfied, the judge may do the rest. The trial judge may make additional findings in aggravation or mitigation, perform any weighing and may be the ultimate decision maker. Just as a trial judge may perform any weighing and may be the ultimate decision maker, an appellate court may engage in any factfinding necessary to perform a harmless error analysis without violating the right to a jury trial. A capital defendant

does not have a Sixth Amendment right to have a jury weigh aggravation and mitigation, so any reweighing by appellate judges does not violate the Sixth Amendment.[7] Hence, an appellate court conducting harmless error analysis does not violate the right to a jury trial.[8]

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[7] In *Ring*, this Court created a constitutional right to have a jury determine an aggravator. However, the failure of the jury to make that finding is, itself, subject to harmless error analysis. *United States v. Cotton*, 122 S.Ct. 1781 (May 20, 2002)(holding the indictment's failure to allege a quantity of drugs and finding of element of quantity by judge rather than jury was not structural error where the evidence of the amount was overwhelming and essentially uncontroverted citing *Johnson v. United States*, 520 U.S. 461, 466-467 (1997)); *Neder v. United States*, 527 U.S. 1 (1999)(holding that harmless error analysis applies to the omission of an element and does not violate the Sixth Amendment); *Ring*, 122 S.Ct. at 2443, n.7. (declining reach harmless error argument that finding of aggravator was implicit in the jury's guilty verdict and remanding for lower court to do so). Thus, the failure of a jury to make the finding of an aggravator is subject to harmless error analysis as well.

[8] Furthermore, the logic of Foster's position is not limited to the harmless error analysis associated with aggravators in capital cases, it applies equally to all other elements in all cases. All appellate courts would have to cease performing any harmless error analysis in all criminal cases. Appellate courts would return to being "impregnable citadels of technicality." *Kotteakos v. United States*, 328 U.S. 750, 759 (1946).

QUESTION III

WHETHER AN EXTENDED STAY ON DEATH ROW CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT?

Foster asserts that his extended stay on death row constitutes cruel and unusual punishment. Foster has been on death row since 1975. The Florida Supreme Court rejected this challenge stating:

> Foster argues the trial court erred when it summarily denied his claim that the twenty-three years he has spent on death row constitutes cruel and unusual punishment. We have previously held an extended stay on death row does not constitute cruel and unusual punishment. *See Knight v. State*, 746 So.2d 423, 437 (Fla.1998). . . Therefore, we affirm the trial court's summary denial of this claim, as we find that it is without merit.

Foster, 810 So.2d at 916.

Three Justices of this Court have expressed views on delays in capital sentencing. *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., dissenting from a denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998)(Breyer, J., dissenting from a denial of certiorari); *Knight v. Florida* 528 U.S. 990 (1999)(Thomas, J., concurring in the denial of certiorari). As Justice Thomas explained, the delay in carrying out executions stems from this Court's "Byzantine" death penalty jurisprudence. *Knight*, 528 U.S. at 998. He noted that lengthy delays between sentencing and execution was an inevitable consequence of this Court's mandates. He noted that the common law practice of executing the defendant one day after sentencing would indeed have the deterrent effect lacking in the current system, but such a practice would find little support from this Court. *Knight*, 528 U.S. at n.1. Justice Thomas also noted the state and lower federal courts had rejected

Justice Stevens' invitation to serve as laboratories. He noted that Alabama, Arizona, California, Montana and Texas Courts as well as the Fifth and Tenth Circuits had rejected such claims and therefore, the Court should consider the experiment concluded.[9]

The courts of Arkansas, Florida, Idaho, Illinois, Mississippi, Nebraska, and Tennessee have now joined.[10] The Eighth Circuit has joined as well.[11] No court has adopted this position.[12] The experiment has indeed concluded.

The California Supreme Court has recently held that two decades on death row did not amount to cruel and unusual punishment. *People v. Anderson*, 22 P.3d 347 (Cal. 2001). The *Anderson* Court explained that the appeals process is a constitutional safeguard, not a constitutional defect. The California Supreme Court observed that any delay argument was untenable because if the death sentence is reversed on appeal, a defendant has suffered no conceivable prejudice and if the death sentence is affirmed, the delay has prolonged his life. The *Anderson* Court noted that a defendant can have no conceivable complaint about his extended incarceration because life without possibility of parole is the minimum sentence. In other words, a defendant would been facing prolonged incarceration regardless of the delay. *Anderson*, 22 P.3d at 389-390.

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[9] *Ex parte Bush*, 695 So.2d 138, 140 (Ala.1997); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997); *People v. Frye*, 959 P.2d 183, 262 (Cal. 1998); *People v. Massie*, 967 P.2d 29, 44-45 (Cal. 1998); *State v. Smith*, 931 P.2d 1272, 1287-1288 (Mont. 1996); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996); *White v. Johnson*, 79 F.3d 432, 439-440 (5th Cir. 1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995).

[10] *Hill v. State*, 962 S.W.2d 762, 765 (Ark. 1998)(holding delay of 15 years that was not attributable to the defendant was not cruel and unusual punishment); *Booker v. State*, 773 So.2d 1079, 1096 (Fla. 2000)(holding delay of over two decades on death row was not cruel and unusual punishment); *McKinney v. State*, 992 P.2d 144, 150-52 (Idaho 1999)(holding delay of 17 years of solitary confinement on death row was not cruel and unusual punishment); *People v. Simms*, 736 N.E.2d 1092,1141 (Ill. 2000)(holding delay of 15 years was not cruel and unusual punishment); *Jordan v. State*, 786 So.2d 987, 1028 (Miss. 2001)(holding delay of 22 years was not cruel and unusual punishment); *State v. Moore*, 591 N.W.2d 86, 93 (Neb. 1999)(rejecting as "completely without merit" delay of 19 years was not cruel and unusual punishment and characterizing the claim as a "mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it."); *State v. Austin*, 2001 WL 242576, *37 (Tenn.Crim.App.2001)(holding delay of 24 years, "caused in large part by numerous appeals and collateral attacks lodged by the Appellant" was not cruel and unusual punishment)

[11] *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998)

[12] Only one court has followed this logic and it later changed its position. *State v. Richmond*, 886 P.2d 1329 (Ariz. 1994)(commuting a death sentence to life based in part on the lengthy delay of nearly thirty years); but see *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997)(perceiving no constitutional violation because there is no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution); *State v. Mata*, 916 P.2d 1035 (Ariz 1996)(abrogating *Richmond* and finding that the statutory aggravating factor of heinous, cruel, or depraved manner was not unconstitutionally vague and those who were subject to that aggravating factor, did not have to be resentenced).

As the Eighth Circuit observed, the delay in capital cases, in large part, "is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life." *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998)(stating that a fifteen year delay does not "even begin to approach a constitutional violation"). There is nothing unusual about a significant period between a death penalty being imposed and the execution. Unfortunately, it is all too usual for defendants to be executed only after an extended length of time on death row. An extended stay on death row certainly is not unusual, rather it is quite common.

Furthermore, the Florida Supreme Court has taken steps to closely monitor death penalty cases with tight time constraints to address the "virtually endemic" delays which are "totally unacceptable". *State v. Williams*, 797 So.2d 1235, 1242 (Fla. 2001)(Wells, C.J., concurring)(quoting a trial court's order and observing the need to make such cases a priority in a case with a 19 year delay). These are the appropriate remedies for delays in capital cases, not abolishing the death penalty which this argument is merely a species of. Thus, an extended stay on death row is not cruel and unusual punishment.

CONCLUSION

Respondent, the State of Florida, respectfully requests this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI has been furnished by U.S. Mail to Joseph F. McDermott, Esq., 7116-A Gulf Boulevard St. Petersburg, FL 33706, on July 22, 2002.

CAROLYN SNURKOWSKI*
ASSISTANT DEPUTY ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

CHARLES KENNETH FOSTER *v.* FLORIDA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 01–10868. Decided October 21, 2002

The petition for a writ of certiorari is denied.

Statement of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

In response to JUSTICE THOMAS' concurring opinion, I think it appropriate once again to emphasize that the denial of a petition for a writ of certiorari does not constitute a ruling on the merits. See *Knight* v. *Florida*, 528 U. S. 990 (1999) (opinion of STEVENS, J., respecting denial of petitions for writ of certiorari); *Singleton* v. *Commissioner*, 439 U. S. 940, 942–946 (1978) (opinion of STEVENS, J., respecting denial of petition for writ of certiorari).

SUPREME COURT OF THE UNITED STATES

CHARLES KENNETH FOSTER *v.* FLORIDA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 01–10868. Decided October 21, 2002

JUSTICE THOMAS, concurring in denial of certiorari.

In the three years since we last debated this meritless claim in *Knight* v. *Florida*, 528 U. S. 990 (1999) (THOMAS, J., concurring), nothing has changed in our constitutional jurisprudence.* I therefore have little to add to my previous assessment of JUSTICE BREYER's musings. See *id.*, at 992 ("Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence").

This Court's vacatur of a death sentence because of constitutional error does not bar new sentencing proceedings resulting in a reimposition of the death penalty. Petitioner seeks what we would not grant to a death-row inmate who had suffered the most egregious of constitu-

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*JUSTICE BREYER notes that the Supreme Court of Canada has expressed concern over delays in the administration of the death penalty in the United States. *Post*, at 2–3. I daresay that court would be even more alarmed were there, as Blackstone commended, only a 48-hour delay between sentence and execution. *Knight*, 528 U. S., at 990–991, n. 1 (THOMAS, J., concurring) (citing 4 W. Blackstone, Commentaries *397). In any event, JUSTICE BREYER has only added another foreign court to his list while still failing to ground support for his theory in any decision by an American court. *Id.*, at 990. While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans. Cf. *Atkins* v. *Virginia*, 536 U. S. —, —, (2002) (REHNQUIST, C. J., dissenting) (slip op., at 1–2).

tional errors in his sentencing proceedings—a permanent bar to execution. Murderers such as petitioner who are not apprehended and tried suffer from the fear and anxiety that they will one day be caught and punished for their crimes—perhaps even sentenced to death. Will JUSTICE BREYER next have us consider the constitutionality of capital murder trials that occur long after the commission of the crime simply because the criminal defendants, who have evaded capture, have been so long suffering?

Petitioner could long ago have ended his "anxieties and uncertainties," *post*, at 3, by submitting to what the people of Florida have deemed him to deserve: execution. Moreover, this judgment would not have been made had petitioner not slit Julian Lanier's throat, dragged him into bushes, and then, when petitioner realized that he could hear Lanier breathing, cut his spine. 369 So. 2d 928, 929 (Fla. 1979).

SUPREME COURT OF THE UNITED STATES

CHARLES KENNETH FOSTER *v.* FLORIDA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 01–10868. Decided October 21, 2002

JUSTICE BREYER, dissenting from denial of certiorari.

Petitioner Charles Foster has spent more than 27 years in prison since his initial sentence of death. He was sentenced to death on October 4, 1975. In 1981, five days before his scheduled execution, a Federal District Court issued a stay to permit consideration of his first federal habeas petition. This petition was temporarily successful. The Court of Appeals held that Foster's sentence was constitutionally defective because the trial court had failed to state required findings regarding mitigating factors. But four months later the court withdrew relief, saying that it had wrongly raised the question *sua sponte*. *Foster* v. *Strickland*, 707 F. 2d 1339, 1352 (CA11 1983).

In 1984, a second death warrant issued. The courts again stayed the execution. From 1987 to 1992, the Florida courts twice vacated Foster's sentence because the trial court had failed properly to consider certain mitigating factors. New sentencing proceedings followed. Each time Foster was again sentenced to death. Foster's latest resentencing took place in 1993, 18 years after his initial sentence and 10 years after the Court of Appeals first found error.

Foster now asks this Court to consider his claim that his execution, following these lengthy proceedings, would violate the Constitution's prohibition of "cruel and unusual punishments." JUSTICE STEVENS and I have previously argued that the Court should hear this kind of claim. See *Lackey* v. *Texas*, 514 U. S. 1045 (STEVENS, J., respecting denial of certiorari); *Elledge* v. *Florida*, 525 U. S. 944

(1998) (BREYER, J., dissenting from denial of certiorari); *Knight* v. *Florida*, 528 U. S. 990, 993–999 (1999) (BREYER, J., dissenting from denial of certiorari). And I believe the present case presents circumstances particularly fitting for this Court's review.

For one thing, 27 years awaiting execution is unusual by any standard, even that of current practice in the United States, where the average executed prisoner spends between 11 and 12 years under sentence of death, U. S. Dept. of Justice, Bureau of Justice Statistics Bulletin, T. Snell, Capital Punishment 2000, p. 12 (Dec. 2001). A little over two years ago, there were only eight prisoners in the United States who had been under sentence of death for 24 years or more, and none who had been on death row for 27 years. *Id.*, at 13. Now we know there is at least one.

For another thing, as JUSTICE STEVENS and I have previously pointed out, the combination of uncertainty of execution and long delay is arguably "cruel." This Court has recognized that such a combination can inflict "horrible feelings" and "an immense mental anxiety amounting to a great increase of the offender's punishment." *In re Medley*, 134 U. S. 160, 172 (1890); see also *Furman* v. *Georgia*, 408 U. S 238, 288–289 (1972) *(per curiam)* (BRENNAN, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll"). Courts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel. *E.g.*, *Pratt* v. *Attorney General for Jamaica*, [1994] 2 A. C. 1, 29, 33, 4 All E. R. 769, 783, 786 (P. C. 1993) (en banc) (U. K. Privy Council); *Soering* v. *United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, ¶111 (1989) (European Court of Human Rights). See *Knight*, *supra*, at 995–996. Consistent with these determinations, the Supreme Court of Canada recently held that the potential for lengthy incarceration before execution is "a relevant consideration" when determining whether extradition to the United States violates principles of "fundamental justice." *United States* v. *Burns*, [2001] 1 S. C. R. 283, 353, ¶123. Just as "attention to the judgment of other nations" can help Congress determine "the justice and propriety of [America's] measures," The Federalist No. 63, so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment. Cf. *Atkins* v. *Virginia*, 536 U. S. —, —, n. 21 (2002) (slip op., at 11–12, n. 21).

Foster has endured an extraordinarily long confinement under sentence of death, a confinement that extends from late youth to later middle age. The length of this confinement has resulted partly from the State's repeated procedural errors. Death row's inevitable anxieties and uncertainties have been sharpened by the issuance of two death warrants and three judicial reprieves. If executed, Foster, now 55, will have been punished both by death and also by more than a generation spent in death row's twilight. It is fairly asked whether such punishment is both unusual and cruel.

I would grant the petition for certiorari in this case.